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IN THE
Supreme Court of the United States

MARTIN HORN, COMMISSIONER
PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
CONNER BLAINE, SUPERINTENDENT
STATE CORRECTIONAL INSTITUTION AT GREENE;
JOSEPH P. MAZURKIEWICZ, SUPERINTENDENT
STATE CORRECTIONAL INSTITUTION AT ROCKVIEW
Petitioners

v.

ANDRE STEVENS
Respondent

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(Capital Case)

1. Whether in violation of the Antiterrorism and Effective Death Penalty Act of 1996 the Court of Appeals in this habeas corpus case set aside a reasonable state-court determination of fact that a prospective capital sentencing juror was biased and properly excused for cause under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1995), in favor of its own debatable interpretation of the record.

2. Whether the Court of Appeals misinterpreted *Witt* and erroneously affirmed the District Court's order vacating the state prisoner's death sentences and granting a new sentencing proceeding, because it failed to properly consider evidence of the juror's demeanor that so strongly contributed to the state trial court's decision to exclude her from service.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion and order of the Court of Appeals affirming the District Court is unpublished and is reprinted in Pet. App. 1a. The opinion and order of the District Court granting the petition for writ of habeas corpus in part is published and is reprinted in Pet. App. 1b. *Stevens v. Horn*, 319 F.Supp.2d 592 (W.D.Pa. 2004). The opinion and order of the Pennsylvania Supreme Court affirming the Beaver County Court of Common Pleas ("trial court") is published and is reprinted in Pet. App. 1c. *Commonwealth v. Stevens*, 559 Pa. 171, 739 A.2d 507 (1999). The opinion and order of the trial court denying state collateral relief is unpublished, and those portions relevant to this petition are reprinted in Pet. App. 1d.

STATEMENT OF JURISDICTION

The Court of Appeals affirmed the District Court's order granting the petition for writ of habeas corpus in part on July 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. §§ 2254(d), (e)(1).

STATEMENT OF THE CASE

On April 21, 1993, after a non-jury trial, the respondent Andre Stevens was convicted in the Court of Common of Beaver County, Pennsylvania, of two counts of first-degree murder. The evidence presented during the trial established that on February 8, 1992, Stevens was a customer at Armando's bar, a local drinking establishment. Sometime before 1:00 a.m., his estranged wife, Brenda Jo Stevens ("Brenda Jo"), entered the establishment with friends. Brenda Jo proceeded past Stevens and sat near the end of the dance floor with Michael Love, an off-duty police officer and acquaintance whom she had met a few months before. When Brenda Jo and Love began dancing, Stevens left the bar and walked to his car to retrieve his

nine millimeter semi-automatic pistol loaded with hollow point bullets. He returned to the bar with the gun and walked across the dance floor toward Brenda Jo and Love, cocking the gun as he walked. As the two victims were leaving the crowded dance floor in different directions, Stevens opened fire on them, killing both. Stevens fired one of the shots into Love's scrotum area, which caused him to suffer a great deal of pain. Pet. App. 2c-3c, 31c.

Following the non-jury trial, the penalty phase of the capital trial began with the selection of a sentencing jury. During *voir dire* before the trial court, prospective juror Nancy Hartling was examined. The transcript of that proceeding, in relevant part, provides:

> THE COURT: As you know you are being considered as a juror in a case involve[sic] the deaths by homicide of Brenda Jo Stevens and Michael Love. This occurred on February 8, 1992 at Armando's Restaurant/Bar located in Rochester Township. The Defendant is Andre Stevens and the Commonwealth has secured a verdict of guilty of murder of the first degree with respect to both of those deaths. It is now up to a jury to determine whether to impose the penalty of death or the penalty of life imprisonment upon Mr. Stevens. Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?
>
> A I don't believe in the death penalty.
>
> THE COURT: Very well.

[PROSECUTOR]: Challenge for cause, Your Honor.

THE COURT: Very well. You are excused, thank you.

Pet. App. 2e-3e. Defense counsel did not object to the Commonwealth's challenge for cause or seek to question Hartling about her opinion. *Id.*

Based upon the evidence presented, the sentencing jury found the grave risk and multiple victim aggravating circumstances with respect to the murder of Brenda Stevens.[1] Pet. App. 3d-4d. In addition to these aggravating circumstances, the jury found the aggravating circumstance of torture with respect to the murder of Michael Love.[2] *Id.* As to mitigating circumstances the jury found that Stevens had no significant history of prior criminal convictions and that he was under extreme mental and emotional disturbance with respect to both victims.[3] *Id.* Having concluded that the aggravating circumstances outweighed the mitigating circumstances, the jury returned a verdict of death on both counts on April 29, 1993. *Id.* Stevens's convictions and death sentences were affirmed on direct appeal. *Commonwealth v. Stevens*, 543 Pa. 204, 670 A.2d 623 (1996), *cert. denied Stevens v. Pennsylvania*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

Stevens filed a state collateral petition alleging, *inter alia*, that the trial court improperly excused prospective juror Nancy Hartling based upon her views about the

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[1] 42 Pa.C.S. § 9711(d)(7)(11).

[2] 42 Pa.C.S. § 9711(d)(8).

[3] 42 Pa.C.S. § 9711(e)(1)(2).

death penalty in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). This claim was rejected by the Pennsylvania state courts. In so doing, the state courts clearly explained that the trial judge's assessment of the juror's demeanor strongly contributed to the decision to exclude her from serving on the sentencing jury. As the trial court explained:

> [W]hat cannot be discerned from the record is the tone of her response and her demeanor when she responded to our question. . . . Contrary to [Stevens's] allegation, we did not summarily dismiss Mrs. Hartling. Rather, our decision was based upon her statement *and the manner in which it was made.* Although we have no specific recollection of Mrs. Hartling and the transcript is incapable of reflecting the tone of her response as well as her demeanor is so responding, had this juror's answer not been emphatic and clearly conveyed her unwillingness to comply with the court's instructions, we would not have sustained a challenge for cause. As is apparent from the record, we repeatedly asked jurors whether they would be able to set aside their opinions -- whatever it might be -- and follow the court's instructions. Moreover, the Commonwealth's immediate challenge for cause, without objection from defense counsel, is corroborative of Mrs. Hartling's adamant position.

Pet. App. 7d-8d (emphasis supplied). In affirming the trial court's decision to strike Hartling for cause, the Pennsylvania Supreme Court observed:

> Here, the remainder of *voir dire* indicates that the trial court did not deny counsel

> the opportunity to question the venireman or to attempt to rehabilitate the prospective jurors if counsel chose to do so, and specifically directed [Stevens's] counsel to object if he thought the trial court's granting of the challenge for case was improper. Our review of *voir dire* indicates that with most other jurors, except where the cause for striking a juror was immediately clear, the court inquired as to whether that juror would be able to set aside his or her personal opinion of the death penalty and follow the instructions of the court. *We accept the statement of the trial court in its opinion when it stated that its decision not to conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question.*

Commonwealth v. Stevens, 739 A.2d 507, 521 (Pa. 1999) (emphasis supplied). Pet. App. 26c-27c.

On November 24, 2000, Stevens filed a petition for writ of habeas corpus in the District Court raising fourteen (14) claims, including the *Witherspoon* claim.

On May 26, 2004, the District Court granted Stevens relief from his sentences of death.[4] *Stevens v. Horn*, 319 F.Supp.2d 592 (W.D.Pa. 2004). Pet. App. 1b. The District Court concluded that the trial court's factual finding of juror bias was unreasonable under Section 2254(d)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(2), and that Stevens had overcome the presumption of correctness afforded to state factual determinations under 28 U.S.C. § 2254(e)(1). Pet. App.

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[4]The District Court denied Stevens's petition to the extent that it sought relief from his murder convictions.

23b. In so doing, the District Court focused exclusively on the questioning of the prospective juror, and ignored the trial court's assessment of the juror's demeanor, which so strongly contributed to its decision to exclude her. The District Court did not conduct a hearing on the claim, instead relying on prospective juror Hartling's testimony during *voir dire*.

On July 7, 2006, the Court of Appeals affirmed. Pet. App. 1a. The Court of Appeals held that the state court factual finding regarding the prospective juror's demeanor was not "fairly supported by the record" because it was not evident from the transcript of *voir dire*, but rather was contained in the state court opinions denying state collateral relief. Pet. App. 20a-21a (citing *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). In the alternative, the Court of Appeals held that even if the juror emphatically stated that she did not believe in the death penalty, this fact was not sufficient to support the trial court's factual finding of juror bias. Pet. App. 21a. Moreover, addressing the state court's representation that the trial court's decision not to conduct further inquiry of the prospective juror was based on its assessment of her demeanor, the Court of Appeals substituted its own explanation -- that the trial judge's failure to conduct follow-up questioning was an "oversight." Pet. App. 23a. Finally, addressing the Commonwealth's argument -- predicated on *Witt* -- that the failure of defense counsel to ask follow-up questions of the juror was evidence that the juror's bias was readily apparent to all in attendance, the Court of Appeals distinguished *Witt* on its facts because the trial court in the present case did not ask follow up questions. Pet. App. 24a-26a.

This petition follows.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of *certiorari* for two reasons. First, the Court of Appeals set aside a reasonable state-court determination of fact that prospective capital sentencing juror Nancy Hartling was biased and properly excused for cause under *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1995), in favor of its own debatable interpretation of the record in violation of the Antiterrorism and Effective Death Penalty Act of 1996. *See Rice v. Collins*, 126 S.Ct. 969 (2006) (granting *certiorari* because the Court of Appeals "set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record"). Second, the Court of Appeals misinterpreted this Court's ruling in *Witt* and erroneously affirmed the District Court's order granting state prisoner Andre Stevens's petition for writ of habeas corpus in part and vacating his death sentence, because it failed to properly consider evidence of Hartling's demeanor that so strongly contributed to the trial court's decision to exclude her from service.

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. Under the *Witherspoon* standard, such veniremen could not be excused for cause unless it was "unmistakably clear" that "that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them" or that "their attitude toward the death penalty would prevent

them from making an impartial decision as to the defendant's guilt." *Id.* at 523 n.21.

The Court modified the *Witherspoon* standard in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1995), where it held that the standard for determining whether a prospective juror may be excluded for cause because of the juror's views of capital punishment "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). The Court added that this standard does not require that a juror's bias be proved with "unmistakable clarity" as stated in *Witherspoon*. *Id.*

A. The Court Should Grant *Certiorari* Because The Court Of Appeals Set Aside Reasonable State Court Determinations Of Fact In Favor Of Its Own Debatable Interpretation Of the Record In Violation Of AEDPA.

Recently, in *Rice v. Collins*, 126 S.Ct. 969 (2006), the Court began its opinion by stating that it granted *certiorari* because it was "[c]oncerned that, in this habeas corpus case, a federal court set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record . . . ." *Id.* at 972. The same concern exists in the present case.

The question of whether a venireman is biased is a factual determination subject to the "presumption of correctness" contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Witt*, 469 U.S. at 429. Under AEDPA, the federal courts must deny federal habeas relief on any claim that was adjudicated on the merits in a state court proceeding unless, *inter alia*, the adjudication "resulted in a

decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Moreover, under AEDPA "a determination of a factual issue made by a State court shall be presumed to be correct" and the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In the present case, the state court opinions that address the disqualification of prospective juror Nancy Hartling clearly indicate that the trial judge's assessment of her demeanor strongly contributed to the decision to exclude her from serving on the sentencing jury. The trial judge wrote:

> [W]hat cannot be discerned from the record is the tone of her response and her demeanor when she responded to our question. . . . Contrary to [Stevens's] allegation, we did not summarily dismiss Mrs. Hartling. Rather, our decision was based upon her statement *and the manner in which it was made.* Although we have no specific recollection of Mrs. Hartling and the transcript is incapable of reflecting the tone of her response as well as her demeanor is so responding, had this juror's answer not been emphatic and clearly conveyed her unwillingness to comply with the court's instructions, we would not have sustained a challenge for cause. As is apparent from the record, we repeatedly asked jurors whether they would be able to set aside their opinions -- whatever it might be -- and follow the court's instructions. Moreover, the Commonwealth's immediate challenge for cause, without objection from defense

> counsel, is corroborative of Mrs. Hartling's adamant position.

Pet. App. 7d-8d (emphasis supplied). In affirming the trial court's decision to strike Hartling for cause, the Pennsylvania Supreme Court reviewed the entire record of *voir dire*, and then observed:

> Here, the remainder of *voir dire* indicates that the trial court did not deny counsel the opportunity to question the venireman or to attempt to rehabilitate the prospective jurors if counsel chose to do so, and specifically directed [Stevens's] counsel to object if he thought the trial court's granting of the challenge for case was improper. Our review of *voir dire* indicates that with most other jurors, except where the cause for striking a juror was immediately clear, the court inquired as to whether that juror would be able to set aside his or her personal opinion of the death penalty and follow the instructions of the court. *We accept the statement of the trial court in its opinion when it stated that its decision not to conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question.*

Commonwealth v. Stevens, 739 A.2d 507, 521 (Pa. 1999] (emphasis supplied). Pet. App. 26c-27c.

Although the Pennsylvania Supreme Court accepted the statement of the trial court that its decision not to conduct further inquiry of Ms. Hartling was based on its assessment of her demeanor, the Court of Appeals did not. Instead, as in *Rice*, the Court of Appeals substituted its own interpretation of the record:

Our review of the partial record of *voir dire* provided to the District Court indicates,[5] however, that only a few potential jurors were actually similarly situated to Hartling. Of those few potential jurors, perhaps seven, who responded to the judge's opening question about the death penalty with an answer suggesting opposition to the death penalty, the trial judge failed twice-in the case of both Hartling and a prospective juror named James L. Perrott to conduct any colloquy whatsoever to determine whether the venire members would be able to set aside their moral difficulties with capital punishment. The fact that the trial judge conducted a proper colloquy in the remaining handful of similar instances, then, is of little persuasive value. The remaining instances do not comprise a significant number-or, for that matter, a large enough percentage of the similar situations. Under these circumstances, we cannot easily attribute the absence of the proper colloquy in Hartling's case to something unremembered about her demeanor. Indeed, it may be noteworthy that Hartling was the first potential juror, and the only juror to do so on the first day of *voir dire*, who told the trial judge that she had moral qualms about the death penalty. This may suggest, if anything, that the trial judge's failure to conduct proper follow-up questioning was an oversight, although one of constitutional

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[5]To the contrary, the Commonwealth provided the District Court with a complete copy of the *voir dire* proceeding. *See Horn v. Stevens*, Civil Action No. 99-1918, Dkt. 14, App. 3-4, 6 (W.D. Pa.).

> proportions. The trial judge may simply have not yet well-thought out how he would handle a potential juror who expressed moral opposition to capital punishment.

Pet. App. 22a-23a (footnote omitted).

As in *Rice*, the Court of Appeals' alternative interpretation of the record in the present case is "debatable." *Rice*, 126 S.Ct. at 972. Indeed, the "oversight" theory espoused by the Court of Appeals is belied by the language of the trial court's question to prospective juror Nancy Hartling:

> Do you have an opinion about the death penalty *which would prevent you from following the Court's instructions as to what penalty should be imposed?*

Pet. App. 2e (emphasis supplied). This question reveals that the trial court clearly understood that a prospective juror may be excluded for cause for his/her views of capital punishment only when those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. at 45. The question also reveals that the trial court had a plan in advance for dealing with prospective jurors who may express moral opposition to capital punishment, which was to limit its questions in order to solicit only those opinions that would prevent the juror from following the court's instructions. By substituting its debatable "oversight" theory for the explanation supplied by the Pennsylvania state courts, the Court of Appeals misapplied "settled rules that limit its role and authority." *Rice*, 126 S.Ct. at 972.

The Court of Appeals believed that it was at liberty to substitute its own interpretation of the record for

that of the state courts because it believed that the trial court's factual determination was not "fairly supported by the record." Pet. App. 20a-21a. However, there is ample support in the record for the trial court's factual determination that Hartling would not have been able to set aside her bias against the death penalty and apply the law as instructed by the trial court. *First*, the trial court's conclusion is supported by its observation of Hartling's demeanor, which was described as "emphatic" and "clearly convey[ing] her unwillingness to comply with the court's instructions." Pet. App 7d-8d. *Second*, Hartling's statement -- "I don't believe in the death penalty" -- was provided in response to the trial court's question "Do you have an opinion about the death penalty *which would prevent you from following the Court's instructions as to what penalty should be imposed?*" Pet. App. 2e (emphasis supplied). When Hartling's statement is considered in the context of the question asked, her response implies that her opinion against the death penalty would prevent her from following the trial court's instructions. *See generally Witt*, 469 U.S. at 435 ("Respondent's attempt to separate the answers from the questions misses the mark."). *Third*, in the notes of testimony during *voir dire*, Stevens's counsel did not object to Hartling's disqualification or seek to rehabilitate her. Pet. App 2e-3e. The importance of the latter was described by the Supreme Court in *Witt*:

> Thus, whatever ambiguity respondent may find in this record, we think that the trial court, aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve it in favor of the State. We note in addition that respondent's counsel chose not to question [the juror] himself, or to object to the trial court's excusing her for cause. This questioning might have resolved any perceived ambiguities in the questions; its absence

> is all the more conspicuous because counsel did object to the trial court's excusing other veniremen later on during the *voir dire*. Indeed, from what appears on the record it seems that at the time [the juror] was excused no one in the courtroom questioned the fact that her beliefs prevented her from sitting. The reasons for this, although not crystal clear from the printed record, may well have been readily apparent to those viewing [the juror] as she answered the questions.

Witt, 469 U.S. at 434-435. As a result, there is support in the record for the trial court's determination of bias.

B. The Court Should Grant *Certiorari* Because The Court Of Appeals Has Decided An Important Federal Question In A Way That Conflicts With The Court's Decision In *Wainwright v. Witt*.

In *Witt*, the Court noted the limited effectiveness of *voir dire* in determining juror bias in capital cases:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"' these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite the lack of clarity in the printed record, however, there will be situations where the trial judge is left with

> the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-425.

Consistent with that assessment, the Court has emphasized the importance of demeanor and credibility in determining bias:

> [T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.

Reynolds v. United States, 98 U.S. 145, 156-157, 25 L.Ed. 244 (1879]. Similarly, the Court has stated:

> Face to face with living with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.

Marshall v. Lonberger, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

Despite the strong reliance the trial judge placed on his observations of Hartling's demeanor, the Court of Appeals dismissed this consideration:

> For that matter, even if we accepted the trial judge's supposition that he relied on something emphatic in Hartling's demeanor, the result would be no different. Even if Hartling emphatically stated that she did not "believe in" the death penalty, all that could reasonably by inferred is that her moral opposition to capital punishment was strongly felt.

Pet. App. 21a. In the Court of Appeals' view, it is more important what the prospective juror says than how the juror says it. Under this approach, therefore, if Hartling were to have jumped on top of the trial judge's bench and screamed at the top of her lungs "I do not believe in the death penalty!" it would still have been unreasonable under AEDPA for the trial court to conclude as a factual matter that her ability to perform her duties as a juror would be substantially impaired without asking follow-up questions. This elevation of the spoken word over other factors such as demeanor is contrary to the decisions of this Court described above. As a result, this petition should be granted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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DATE: October 5, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

Nos. 04-9011 & 04-9013

Andre STEVENS

v.

Martin HORN, Commissioner, Pennsylvania Department of Corrections; Conner Blaine, Superintendent of the State Correctional Institution at Greene; Joseph P. Mazurkiewicz, Superintendent of the State Correctional Institution at Rockview,

Appellants in No. 04-9011

Andre Stevens,

Appellant in No. 04-9013

v.

Martin Horn, Commissioner, Pennsylvania Department of Corrections; Conner Blaine, Superintendent of the State Correctional Institution at Greene; Joseph P. Mazurkiewicz, Superintendent of the State Correctional Institution at Rockview.

On Appeal from the United States District Court for the Western District of Pennsylvania, (D.C.Civ. No. 99-cv-01918), District Judge: Honorable Arthur J. Schwab.

Submitted Under Third Circuit LAR 34.1(a)

July 6, 2006.

(Filed July 7, 2006)

Before VAN ANTWERPEN, ALDISERT and NYGAARD, Circuit Judges.

OPINION

VAN ANTWERPEN, Circuit Judge.

In this appeal and cross-appeal in a capital case, the Commonwealth of Pennsylvania and Andre Stevens ask us to review the District Court's partial grant of Stevens's petition for writ of habeas corpus. We will affirm the judgment of the District Court in all respects.

I.

Stevens was convicted at a 1993 bench trial on two counts of first-degree murder.[1] At trial, Stevens did not dispute that he shot his estranged wife, Brenda Jo Stevens, and her acquaintance, Michael Love, at a Beaver County, Pennsylvania, bar. A jury was empaneled for the capital sentencing phase. It unanimously found the existence of aggravating factors, and it unanimously found that those

[1] We discuss the relevant facts of the case in the course of resolving the parties' arguments. For a full account of the offense and procedural history, the interested reader is referred to the District Court's thorough opinion. See Stevens v. Horn, 319 F.Supp.2d 592, 617 (W.D.Pa.2004)

aggravating factors outweighed the mitigating factors. Stevens was sentenced to death. On direct appeal, the Supreme Court of Pennsylvania affirmed. Commonwealth v. Stevens, 670 A.2d 623, 627-28 (Pa.1996).

Shortly thereafter, Stevens filed a petition pursuant to the Pennsylvania Post-Conviction Relief Act (PCRA). The PCRA court denied relief. In affirming, the Pennsylvania Supreme Court split, 5-2, on the merits of Stevens's claim that trial counsel rendered ineffective assistance at the guilt phase by failing to investigate, develop, and present a diminished capacity defense. See Commonwealth v. Stevens, 739 A.2d 507, 511-16 (Pa.1999). Unanimously, the court rejected Stevens's argument that counsel ineffectively failed to argue that a potential juror was improperly excluded under Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). Id. at 520-21.

Several months later, Stevens filed his federal habeas petition. In the petition, he raised fourteen claims, including, inter alia, that (a) counsel ineffectively failed to formulate and press a diminished capacity defense and (b) the potential juror's exclusion constituted a Witherspoon violation. The District Court denied relief on the ineffectiveness claim, which was Stevens's only guilt-phase claim. The District Court granted relief on Stevens's Witherspoon claim. Stevens v. Horn, 319 F.Supp.2d 592, 617 (W.D.Pa.2004). It did not reach Stevens's remaining sentencing claims. Both Stevens and the Commonwealth timely appealed.[2]

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[2] The Commonwealth's appeal of the grant of habeas relief on the Witherspoon issue was docketed at C.A. No. 04-9011. Stevens's appeal was docketed at C.A. No. 04-9013. Previously, we granted Stevens a certificate of

II.[3]

A.

Stevens argued in his habeas petition that his trial attorney, Wayne Lipecky, Esq., provided constitutionally inadequate representation by failing to investigate, develop, and present a diminished capacity defense. To establish ineffectiveness on the part of Lipecky, Stevens was required to show both that (a) the attorney performed unreasonably under prevailing professional norms and (b) there exists a "reasonable probability" that, but for counsel's unprofessional errors, he would not have been convicted. See Strickland v. Washington, 466 U.S. 668, 688-89, 694 (1984).

Stevens originally retained Wendell Freeland, Esq., to represent him. Freeland subsequently withdrew because of the cost of hiring mental health

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appealability as to his guilt-phase claim. See 28 U.S.C. § 2253(c)(2).

[3] Our appellate jurisdiction lies pursuant to 28 U.S.C. § 1291. As we discuss in detail in the text when necessary, deferential standards govern a federal habeas court's review of legal and factual determinations made by state courts. See, e.g., Jacobs v. Horn, 395 F.3d 92, 100 (3d Cir.2005). If a legal question was left unresolved by the state courts, our review is de novo. See id.

experts, and the trial court appointed the Beaver County Public Defender's Office to represent Stevens. Lipecky, representing that office, ultimately took over the primary responsibility for the case. Stevens contends that Lipecky failed to forward certain categories of evidence-a journal, Stevens's letters to Freeland, his complete military and employment records, and information from family members about his childhood-to psychiatric experts. During the state postconviction proceedings, several experts opined that, had Lipecky provided this information to an expert prior to trial, he would have been able to secure and present expert testimony at the guilt phase that Stevens suffered-at the time of the offense-from profound neuropsychological ailments. Among other things, these experts testified that Stevens suffered from organic brain damage, psychosis, profoundly disorganized thinking, paranoia, and extreme depression.

The Pennsylvania Supreme Court rejected the ineffectiveness claim, holding that Stevens had "not proved, by a preponderance of the evidence, that there was a reasonable probability that presentation of expert testimony concerning [his] psychosis would have successfully prevented the Commonwealth from proving ··· premeditation beyond a reasonable doubt." Stevens, 739 A.2d at 516. The court relied, in particular, on the trial judge's assertion-when sitting as the PCRA court-that even if he had had the benefit of additional testimony concerning Stevens's neuropsychological deficiencies, he would nevertheless have found that Stevens acted with the specific intent to kill. Id. The PCRA court emphasized, in particular, the evidence indicating that Stevens had purposefully retrieved his weapon from his vehicle before returning to the bar to attack Brenda Jo and Love. Id.

On habeas review, the District Court denied relief on the ineffectiveness claim. Recognizing that the state courts had not decided whether Lipecky's performance was unreasonably deficient, the District Court conducted a de novo review of that issue. See Stevens, 319 F.Supp.2d at 608 (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)). The District Court generally found that Lipecky's performance was reasonable, although it opted not to decide whether Lipecky performed unreasonably in failing to obtain and forward information from Stevens's family about his life and difficult childhood. Stevens, 319 F.Supp.2d at 613.

Turning to the issue of prejudice, the District Court recognized that it would normally owe deference to the Pennsylvania state courts' resolution of that issue. Stevens, 319 F.Supp.2d at 613-14. Nevertheless, it noted Stevens's argument that the Pennsylvania Supreme Court's resolution of the prejudice issue-which seemed to rely on the PCRA judge's subjective observations about how he personally would have viewed the evidence of neuropsychological ailments-was "contrary to" the Supreme Court's binding precedent on ineffectiveness. See id. at 614; see also 28 U.S.C. § 2254(d) (requiring deference by habeas courts to state courts' legal conclusions unless they constituted an "unreasonable application of" or were "contrary to" Supreme Court precedent). The District Court concluded that it need not decide whether the analysis of prejudice conducted by the state courts was "contrary to" Strickland because no prejudice could be shown even under de novo review. Stevens, 319 F.Supp.2d at 614.

B.

Although the substance of our analysis is somewhat different than the District Court's, we agree that Stevens cannot prevail on his ineffectiveness claim. In reaching this conclusion, we exercise our discretion to decide the claim solely on the basis of the Strickland prejudice prong. See Strickland, 466 U.S. at 697 ("[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"). This approach is particularly appropriate in this case because (a) the Pennsylvania Supreme Court did not pass on the reasonableness of Lipecky's performance and (b) the District Court itself opted not to decide some aspects of Stevens's claim that Lipecky unreasonably failed to forward evidence to the psychiatric experts.[4]

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[4] We do agree with much of the District Court's partial appraisal of Lipecky's performance. See Stevens, 319 F.Supp.2d at 609-13. Notably, however, we disagree with the District Court's categorical rejection of Stevens's argument that Lipecky performed unreasonably by failing to forward information about his neuropsychiatric condition, particularly the journal, to the Commonwealth's own mental health expert, Dr. Christine Martone. Dr. Martone testified on postconviction review that if Lipecky had brought the information, particularly the journal, to her attention, it would have profoundly affected the diagnosis she provided the prosecution. Indeed, Dr. Martone testified that the journal suggested Stevens "was experiencing paranoid delusional ideation prior to the shooting" and was actually psychotic at the time of the offense. Lipecky, moreover, told the PCRA court that he had no strategic reason whatsoever for failing to give a copy of

In finding that Stevens had not demonstrated a reasonable probability of prejudice under Strickland, the District Court relied on two themes. First, the District Court concluded that Stevens had not sufficiently pointed to the existence of any admissible evidence that would have been developed if counsel had provided better information to the psychiatric experts. Second, the District Court concluded that there was such "overwhelming evidence of specific intent" that Stevens simply could not demonstrate a reasonable probability that Lipecky's failures had altered the outcome of the guilt phase. Of these two grounds, the second is more persuasive.

"In Pennsylvania, diminished capacity 'is an extremely limited defense, which requires extensive psychiatric testimony establishing a defendant suffered from one or more mental disorders which prevented him from formulating the specific intent to kill.'" Jacobs v. Horn, 395 F.3d 92, 105 (3d Cir.2005) (quoting Commonwealth v. Cuevas, 832 A.2d 388, 393 (Pa.2003)). In the District Court's view, Stevens pointed on postconviction review to too little evidence suggesting he suffered from psychological disorders

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the journal to Dr. Martone. Obviously, if Lipecky had presented evidence that would have shaken the Commonwealth's own expert, the course of the prosecution and trial might have been much different. See, e.g., Clabourne v. Lewis, 64 F.3d 1373, 1385 (9th Cir.1995) (stating that counsel committed "error in failing to provide the state's experts with materials they needed to develop an accurate profile of [the capital defendant's] mental health"); see also Stevens, 739 A.2d at 531 (separate dissents of Justices Zappala and Nigro, relying on Lipecky's failure to provide Dr. Martone with relevant materials).

that might have prevented the formulation of the specific intent to kill. Stevens, 319 F.Supp.2d at 614-16 & n. 18. Specifically, the District Court believed the postconviction testimony of Stevens's experts had been too focused on what they might have been able to tell the jury at the sentencing phase (and not focused enough on what they could have said at the guilt phase). See id. In this regard, the District Court stressed that Dr. Rodney Altman "never stated (and in fact was never asked by Stevens' [s] PCRA counsel) that ··· he would have been able to testify at the guilt phase that Stevens' [s] impairments affected his ability to formulate the specific intent to kill." Id. at 615.[5]

It is true that Dr. Altman's testimony focused largely on what evidence he would have been able to present at the penalty phase if fuller neuropsychological testing had been conducted prior to trial. That said, Dr. Altman expressly testified, with the benefit of the information available on postconviction review, that-at the time of the offense-Stevens was likely psychotic, paranoid, schizophrenic, and exhibited a "thought process disorder." Dr. Ralph E. Landefeld's testimony was similar. Notably, Dr. Christine Martone specifically opined that she believed Stevens's psychosis was serious enough that he was unable to

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[5] In its analysis of the Strickland prejudice prong, the Pennsylvania Supreme Court did not rely on this thinking. See Stevens, 739 A.2d at 515-16. Accordingly, there is no issue of legal deference as to this. See supra n. 3. As noted below, there is an issue of deference as to the District Court's alternative resolution of the prejudice prong.

form the specific intent to kill.[6] Indeed, as Stevens stresses, each of his three primary experts agreed that he suffered from profound neuropsychological ailments at the time of the crime. Although much of the experts' postconviction testimony was focused on what they might have offered at the penalty phase as mitigation evidence, this same testimony was seemingly of the type that Pennsylvania courts have found to be relevant and admissible as to the question of diminished capacity. See, e.g., Jacobs, 395 F.3d at 105; see also Commonwealth v. Legg, 711 A.2d 430, 433 (Pa.1998) (stressing that evidence of cognitive disorders affecting the defendant's ability to act deliberately or permissively was admissible).

More convincing is the District Court's alternative prejudice-prong conclusion, that the evidence presented at trial was so overwhelming that Stevens could not establish a reasonable probability that an objective trier-of-fact, even one presented with a full diminished capacity defense supported by expert testimony, would have found him not guilty. See Stevens, 319 F.Supp.2d at 616-17. In Zettlemoyer v. Fulcomer, 923 F.2d 284, 297 (3d Cir.1991), we concluded that-even if it were assumed, dubitante, that the attorney in that capital case performed unreasonably by failing to obtain and present evidence in support of a diminished capacity defense-the habeas petitioner could not establish Strickland prejudice in the face of "compelling uncontroverted evidence"

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[6] Dr. Martone was the Commonwealth's expert at the time of the guilt phase. See supra n. 4. Thereafter, she was hired by Stevens.

establishing an intent to kill.[7] In the District Court's view, the evidence against Stevens was analogous:

> Stevens admitted during the guilt phase of his trial that he left Armando's bar the night of the murders, retrieved his gun from his car, cocked it three times, and then reentered the bar. He stood near the dance floor and waited for Love and his wife to finish dancing. When they walked away from each other, he approached his wife, pressed the gun to the back of her head and shot her. He then turned to Love-who had raised his arms in the air-and shot him twice in rapid succession. He shot Love several more times while Love lay on the floor, including an intentional shot to his scrotum area. After shooting Love, he then refocused on his wife, who lay lifeless on the floor. He shot her again in the head and he admitted that he had intentionally aimed at her back.

Stevens, 319 F.Supp.2d at 616 (internal citations omitted)

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[7] In his briefs, and echoing Justice Zappala's dissent on PCRA appeal in state court, Stevens takes issue with the entire idea of relying on proof of specific intent. It is clear from Zettlemoyer, however, that we can consider evidence of specific intent when determining whether an attorney's failure to prove a diminished capacity defense constituted ineffective assistance. See Zettlemoyer, 923 F.2d at 297.

The Pennsylvania Supreme Court provided a similar summary of the testimony:

> [T]here was testimony that, on the evening of the murders, Appellant became very angry when he saw Brenda Jo dancing with Love. Appellant slammed his forearms on the bar and stood and stared at Love and Brenda Jo and then left the bar. He retrieved his gun from beneath the seat of his vehicle and returned to the bar. Appellant walked toward the table area, pulled the gun from underneath his jacket, raised it, but then lowered it to his side and waited until Love and Brenda Jo were finished dancing. When they left the dance floor, Appellant cocked the gun and without hesitation walked up behind Brenda Jo and shot her in the back of the head at close range. He then turned to Love and shot him twice rapidly in succession, and fired at Love several times while he lay on the floor, including an intentional shot through the scrotum area. Appellant fired a last shot at Brenda Jo, hitting her again in the head. Appellant had fired a total of ten shots.

Stevens, 739 A.2d at 516.[8] The Supreme Court offered this recounting in the course of expressly agreeing with the PCRA court when it held that, even in the face of a diminished capacity defense fully supplemented with appropriate expert testimony, it "would still have concluded that [Stevens] had the capacity to form the specific intent to kill." Id. Stevens argues that (i) the trial (and PCRA) judge erred when he relied on what his own personal view of a fully-supported diminished capacity defense would have been and (ii) the Pennsylvania Supreme Court exacerbated this error by deferring to the trial judge's subjective views. This is a fair point. Courts have generally indicated that a determination of Strickland prejudice should be the result of an objective analysis (i.e., how an objective decisionmaker would have acted if counsel's unprofessional errors had not occurred). See Strickland, 466 U.S. at 695 (stating that the inquiry into prejudice does "not depend on the idiosyncracies of the particular decisionmaker"); see also United States v. Moran, 393 F.3d 1, 11 n. 6 (1st

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[8] The PCRA court relied on a similar summary of events. Notably, the PCRA court specifically made this finding:

> During Appellant's last separation from his wife, he had gone out with his brother-in-law in the summer prior to the shootings. At that time, Appellant pulled a gun out of his jacket and told his brother-in-law that he was going to kill his sister and a cop. The gun he had shown was the same as the murder weapon.

That court also stressed that Stevens's gun had to be cocked before it could be fired.

Cir.2004); Miller v. Angliker, 848 F.2d 1312, 1323 (2d Cir.1988).

However, even if the approach taken by the state courts was "contrary to"-or, at a minimum, an "unreasonable application" of-Strickland, see 28 U.S.C. § 2254(d), making deference to the state courts inappropriate, Stevens still cannot prevail. As the District Court concluded, even under a de novo review, Stevens cannot establish a reasonable probability that an objective trier-of-fact would have found him not guilty. Stevens, 319 F.Supp.2d at 614. As in Zettlemoyer, the evidence that Stevens formed, and acted upon, the specific intent to kill was too strong. Stevens did not simply erupt into violence when he saw Brenda Jo and Love dancing at a bar. Instead, he went to his vehicle, located his weapon underneath a seat, and cocked it three times. He reentered the bar, pulled the gun from underneath his coat, pointed the weapon at the ceiling and then lowered it. He waited until Brenda Jo and Love finished dancing. These events evince a real deliberateness, and-significantly-they indicate that Stevens acted after having a moment to reflect.

When Brenda Jo and Love finished their dance, Stevens again cocked the gun; he then quickly approached Brenda Jo and shot her in close range in the back of the head. Stevens turned to Love, whose arms were in the air. He shot Love two or three times. He then fired several more times at Love, with the last shot being an intentional shot at the man's groin.[9] Again, these events evince specific intent. Notably, Stevens had to cock the gun before firing it. He fired

[9] Stevens testified that he either thought or said, "you'll f-no more" as he fired the parting shot at Love.

first on Brenda Jo, then turned to Love. The placement of his final shot at Love was obviously purposeful. After Stevens shot Love, he focused attention again on Brenda Jo, who was lifeless on the floor. Stevens shot her again, having-according to his own testimony-intentionally aimed at her head. As with the prior events, these final events, too, suggest real intent. Given this overwhelming evidence of deliberateness and purposefulness, the District Court correctly concluded that Stevens did not establish a reasonable probability that he would have been found not guilty if he had been able to present better testimony from psychiatric experts. The evidence of his own crime, including the evidence he gave at the guilt phase, betray his claim that he acted without any specific intent to kill. Zettlemoyer, 923 F.2d at 297.

For the foregoing reasons, Stevens has not established a reasonable probability that, but for counsel's possible errors in failing to forward evidence to the psychiatric experts, he would not have been convicted. Even a diminished capacity defense that was fully supplemented by expert testimony would have been fatally undermined by the evidence, inherent in the events of the murders, that Stevens acted with the specific intent to kill.

III.

A.

During voir dire prior to the sentencing phase, the following colloquy occurred between potential juror Nancy Hartling and the judge:

> Judge: Do you have an opinion about the death penalty which would prevent you

from following the Court's instructions as to what penalty should be imposed?

Nancy Hartling: I don't believe in the death penalty.

Judge: Very well.

Prosecutor: Challenge for cause, Your Honor.

Judge: Very well. You are excused, thank you.

Stevens's attorney did not object to the exclusion or seek in any way to rehabilitate Hartling. Stevens argued in his habeas petition that the removal of Hartling violated Witherspoon.

In Witherspoon, the Supreme Court held that a member of a jury panel may not be excused for cause simply for "voic[ing] general objections to the death penalty or express[ing] conscientious or religious scruples against its infliction." 391 U.S. at 522. Otherwise, a defendant's right to a fair and impartial jury would be violated. See Szuchon v. Lehman, 273 F.3d 299, 327 (3d Cir.2001). In Wainwright v. Witt, 469 U.S. 412, 424 (1985) (internal quotation and citation omitted), the Court clarified that the proper standard for determining a Witherspoon violation "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." This standard does not require, as footnotes in Witherspoon itself intimated, that a juror's bias against the death penalty be shown with "unmistakable clarity." Id. This is so because

"many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.' " Id. at 424-25. It is enough to justify an excusal that the trial judge be "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Id. at 426. A trial judge's finding under this standard is a factual determination, and it is therefore entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). Martini v. Hendricks, 348 F.3d 360, 363 (3d Cir.2003), cert. denied, 543 U.S. 1025 (2004).[10] This recognizes that a trial judge is in the best position to judge the credibility and demeanor of potential jurors

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[10] The District Court questioned whether 28 U.S.C. § 2254(d)(2) also played a part in federal habeas review of a Witherspoon claim. Stevens, 319 F.Supp.2d at 599 & n. 4. That provision-which asks whether a state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts"-is part of a larger section that instructs federal habeas courts to give deference to the legal conclusions of state courts. Although this court mentioned § 2254(d)(2) in boilerplate in its opinion in Martini, see 348 F.3d at 363, its actual analysis of Martini's Witherspoon claim revolved primarily around § 2254(e)(1), which governs the deference that must be given to state courts' findings of fact. See id. This use of § 2254(e)(1) makes sense because binding precedent holds that a potential juror's bias is a question of fact. Szuchon, 273 F.3d at 327. In any event, if a federal habeas court determines that a state court's factual finding of juror bias has been properly rebutted under § 2254(e)(1), it follows that any resulting legal conclusion by the state court was based "on an unreasonable determination of the facts" under § 2254(d)(2).

during voir dire. Witt, 469 U.S. at 428; Szuchon, 273 F.3d at 328.

When the issue was raised on state postconviction review, the trial judge said he had "no specific recollection of Mrs. Hartling." Nevertheless, he thought there must have been something about Hartling's demeanor that was "emphatic and clearly conveyed her unwillingness to comply with the court's instructions." He noted that he had asked other potential jurors whether they would be able to set aside their opposition to the death penalty. In affirming the denial of postconviction relief, the Pennsylvania Supreme Court also noted that the trial judge had asked "most other potential jurors" whether they would be able to set aside their personal opinions about the death penalty. Stevens, 739 A.2d at 521. It therefore "accept[ed] the statement of the trial court ··· that its decision not to conduct further inquiry with respect to [Hartling] was based on its assessment of her demeanor." Id. The District Court, however, found a straightforward violation of Witherspoon. Stevens, 319 F.Supp.2d at 604.[11]

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[11] In the state courts, as well as in his federal habeas petition, Stevens presented both a Witherspoon claim and a related ineffectiveness claim (i.e., that counsel ineffectively failed to object to the exclusion of Hartling). In its decision denying relief, the Pennsylvania Supreme Court only addressed the question of ineffectiveness. Stevens, 739 A.2d at 521. Because it held that Stevens's had not established any prejudice, see id., that court probably did not see any need to separately address Stevens's underlying Witherspoon claim. It is clear, however, that Stevens fairly presented the Witherspoon issue to the state courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 844

B.

As detailed above, the trial judge-acting on the prosecutor's objection-excused Hartling for cause after she simply expressed her personal opposition to the death penalty. No follow-up questioning ensued to determine whether Hartling could, despite her qualms about the death penalty, set aside her views and follow the trial court's instructions and the law. As the Commonwealth appears to recognize, if we were conducting *de novo* review, we would have to find a Witherspoon violation. Indeed, in Szuchon, conducting *de novo* review, we found a Witherspoon violation in an interchange that was, if anything, slightly more expansive than the colloquy here. See Szuchon, 273 F.3d at 329.

Szuchon was governed by a less deferential standard of review. Under the present, more deferential regime, the state courts' finding that Hartling was biased against the death penalty is presumed to be correct, and Stevens bears "the burden of rebutting the presumption ··· by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).[12] We agree with the District Court

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(1999) (noting that the exhaustion rule only requires habeas petitioners to have given the state courts a "fair opportunity" to consider their claims).

[12] Section 2254(e)(1) states the standard by which a state court's finding of fact is to be evaluated. The statute's use of the term "by clear and convincing evidence" does not place a burden on the habeas petition to present *new* evidence casting doubt on the

that Stevens met that burden here. As noted, and as in Szuchon, the prospective juror-here, Hartling-indicated no more than that she opposed the death penalty. Because the trial judge did not follow up Hartling's single statement with any follow-up questioning, there is simply no tangible evidence in the record to support the finding of the state courts. In the absence of any evidence in the record to support the state courts' finding, it must be true that Stevens has established, by the requisite clear and convincing evidence, that Hartling was removed for cause on a "broader basis than inability to follow the law or abide by [her] oath [as a juror] ." Adams v. Tex., 448 U.S. 38, 48 (1980); see also Gray v. Miss., 481 U.S. 648, 652 n. 3 (1987) ("[a] motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate, as a matter of law, the venire member is not qualified to serve"). Indeed, the record supports but a single conclusion-that Hartling was removed merely because she expressed opposition to the death penalty. This violated Stevens's right to a fair and impartial jury. Witherspoon, 391 U .S. at 522.

In rejecting Stevens's Witherspoon claim, the state courts relied on the trial judge's statement that, although he could not remember the interchange with Hartling, he must have been relying on something emphatic in her demeanor. Stevens, 739 A.2d at 521. A trial judge is certainly entitled to rely on a potential juror's demeanor. See, e.g., Witt, 469 U.S. at 434. However, the dispositive question under Witherspoon

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state finding; it is sufficient that the federal habeas court conclude that the finding of the state court, given the evidence before that court, was clearly and convincingly wrong. See, e.g., Wiggins, 539 U.S. at 528 (applying the standard in this fashion).

and its progeny is "not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." Id. As we indicated in Szuchon, the trial judge-when questioning a potential juror-has an obligation "to make a record of [any] bias" shown by the juror. 273 F.3d at 328 (citing Gray). By relying on supposition that there must have been something "emphatic" about Hartling's demeanor, the state courts failed to heed the Supreme Court's rule that findings of bias must be "fairly supported by the record." Witt, 469 U.S. at 434.

For that matter, even if we accepted the trial judge's supposition that he relied on something emphatic in Hartling's demeanor, the result would be no different. Even if Hartling emphatically stated that she did not "believe in" the death penalty, all that could reasonably be inferred is that her moral opposition to capital punishment was strongly felt. Supreme Court precedent makes clear, however, that the true question was whether Hartling would have been able to set aside her "conscientious or religious scruples against" the death penalty, Witherspoon, 391 U.S. at 522, and "faithfully and impartially apply the law." Witt, 469 U.S. at 426. That Hartling's "conscientious or religious scruples" were strongly felt says remarkably little about whether she could follow the trial court's instructions. See Lockhart v. McCree, 476 U.S. 162, 176 (1986) ("[i]t is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law"); see also Szuchon, 273 F.3d at 331 (holding that the fact that a potential juror did not "believe" in the death penalty was "by no means

the equivalent of being unwilling to impose it"). The state courts had no basis for concluding that Hartling's "views would [have] prevent[ed] or substantially impair[ed] the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." Witt, 469 U.S. at 424.

In rejecting Stevens's Witherspoon claim, the Pennsylvania Supreme Court relied on the fact that the trial judge asked "most other potential jurors" whether they "would be able to set aside ··· personal opinion[s] of the death penalty and follow the instructions of the court." Stevens, 739 A.2d at 521. The Commonwealth does not press this argument in its brief to us. For that matter, the parties have not submitted a complete transcript of the voir dire. Our review of the partial record of voir dire provided to the District Court indicates, however, that only a few potential jurors were actually similarly situated to Hartling. Of those few potential jurors, perhaps seven, who responded to the judge's opening question about the death penalty with an answer suggesting opposition to the death penalty, the trial judge failed twice-in the case of both Hartling and a prospective juror named James L. Perrott[13] to

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[13] Stevens does not argue that a Witherspoon violation occurred as to Perrott. Here is the interchange between the trial judge and Perrott:

> Judge: Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?
>
> James Perrott: Yes, I am opposed to the death penalty.

conduct any colloquy whatsoever to determine whether the venire members would be able to set aside their moral difficulties with capital punishment. The fact that the trial judge conducted a proper colloquy in the remaining handful of similar instances, then, is of little persuasive value. The remaining instances do not comprise a significant number-or, for that matter, a large enough percentage of the similar situations. Under these circumstances, we cannot easily attribute the absence of the proper colloquy in Hartling's case to something unremembered about her demeanor. Indeed, it may be noteworthy that Hartling was the first potential juror, and the only juror to do so on the first day of voir dire, who told the trial judge that she had moral qualms about the death penalty. This may suggest, if anything, that the trial judge's failure to conduct proper follow-up questioning was an oversight, although one of constitutional proportions. The trial judge may simply have not yet well-thought out how he would handle a potential juror who expressed moral opposition to capital punishment.

In its brief, the Commonwealth focuses our attention on attorney Lipecky's failure to object to Hartling's removal. According to this argument, counsel's failure to object suggests that Hartling was so obviously adamant about her opposition to the death penalty that everyone-prosecution, defense, and trial judge-could see there was no point in asking her any

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Judge: Very well.

Prosecutor: Exercise a challenge for cause.

Judge: You are excused then, Mr. Perrott. Thank you.

further questions. See id. In support, the Commonwealth cites this passage from Witt:

> Thus, whatever ambiguity [may be found] in this record, we think that the trial court, aided as it undoubtedly was by its assessment of [the prospective juror's] demeanor, was entitled to resolve it in favor of the State. We note in addition that respondent's counsel chose not to question [the prospective juror] himself, or to object to the trial court's excusing her for cause. This questioning might have resolved any perceived ambiguities in the questions; its absence is all the more conspicuous because counsel did object to the trial court's excusing other veniremen later on during the voir dire. Indeed, from what appears on the record it seems that at the time [the prospective juror] was excused no one in the courtroom questioned the fact that her beliefs prevented her from sitting. The reasons for this, although not crystal clear from the printed record, may well have been readily apparent to those viewing [the prospective juror] as she answered the questions.

Witt, 469 U.S. at 434-35. In the Commonwealth's view, the fact that Lipecky did not object should similarly be read as support for the trial judge's supposition that he must have relied on something in Hartling's demeanor. We cannot agree.

Witt and Stevens's case are quite different. First and foremost, in Witt, the trial judge conducted some

follow-up questioning of the prospective juror who indicated that she had personal reservations about the death penalty. Id. at 415-16. Indeed, the trial judge went on to specifically ask the prospective juror both whether her views would "interfere with [her] sitting as a juror" and whether those views would impair her ability to "judg[e] the guilt or innocence of the Defendant." Id . at 416. Remarkably, she answered yes to both questions. Id. Accordingly, when the Supreme Court wrote in Witt that the trial judge's assessment of the potential juror's demeanor could be used to resolve "ambiguity" in the record, the Court was referring to possible ambiguity in the juror's statements about whether she would be able, notwithstanding her views on the death penalty, to follow the trial court's instructions. In other words, the trial judge was entitled to use the potential juror's demeanor to resolve the relevant question-whether she could follow the law.

Here, by contrast, the trial judge never followed up on Hartling's *initial* statement that she opposed capital punishment. Under Witherspoon and its progeny, including Witt, that was error. See Witherspoon, 391 U.S. at 522; Witt, 469 U.S. at 422 (indicating that the key question is whether the venire member would "refuse[ ] to follow the statutory scheme" controlling when the death penalty should be given). As noted above, the fact that no follow-up questioning was utilized means that the trial judge was able to compile no record concerning whether Hartling was fatally biased against imposition of the death penalty. See Szuchon, 273 F.3d at 328; see also Witt, 469 U .S. at 423 (noting that it is the adversary seeking exclusion [i.e., here, the Commonwealth] who "must demonstrate ··· that the potential juror lacks impartiality"). Moreover, and significantly for present purposes, the fact that no follow-up questioning occurred also means that no

ambiguity existed in Hartling's answers as to the relevant question-whether she could follow the trial judge's instructions. After all, as noted, even if Hartling emphatically stated that she was opposed to capital punishment, whether she could nevertheless follow the law posed a separate question. See Lockhart, 476 U.S. at 176. Accordingly, because Hartling was never asked about her willingness and ability to follow the law, the trial judge in Stevens's case-unlike the trial judge in Witt-was not in a position to evaluate and factor in her demeanor when answering the relevant question. The quotation from Witt is not a satisfactory rebuttal to Stevens's Witherspoon claim.

Because Hartling was removed from the venire on the sole basis of her statement that she opposed capital punishment, Stevens was denied his constitutional right to a fair and impartial jury. Witherspoon, 391 U.S. at 522. The trial judge did not have enough information before him to conclude that she "would be unable to faithfully and impartially apply the law." Witt, 469 U.S. at 426. The state courts' finding of bias was not supported by anything more than speculation and, accordingly, Stevens met his burden of showing the constitutional violation by the requisite clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

IV.

For the reasons detailed, the District Court properly refused to grant habeas relief on Stevens's claim that his attorney rendered ineffective assistance at the guilt phase (C.A. No. 04-9013). The District Court's correctly awarded relief on Stevens's Witherspoon claim, however (C.A. No. 04-9011). We will affirm the District Court's judgment in all respects.

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

Nos. 04-9011 & 04-9013

Andre STEVENS

v.

Martin HORN, Commissioner, Pennsylvania Department of Corrections; Conner Blaine, Superintendent of the State Correctional Institution at Greene; Joseph P. Mazurkiewicz, Superintendent of the State Correctional Institution at Rockview,

Appellants in No. 04-9011

Andre Stevens,

Appellant in No. 04-9013

v.

Martin Horn, Commissioner, Pennsylvania Department of Corrections; Conner Blaine, Superintendent of the State Correctional Institution at Greene; Joseph P. Mazurkiewicz, Superintendent of the State Correctional Institution at Rockview.

On Appeal from the United States District Court for the Western District of Pennsylvania, (D.C.Civ. No. 99-cv-01918), District Judge: Honorable Arthur J. Schwab.

Submitted Under Third Circuit LAR 34.1(a)

July 6, 2006.

Before VAN ANTWERPEN, ALDISERT and NYGAARD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court from the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered May 27, 2004, be and the same is hereby affirmed. Each side shall bear its own costs. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

DATED: July 7, 2006

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANDRE STEVENS,	
	Civil Action No. 99-1918
V.	
MARTIN HORN,	Judge Arthur J. Schwab
Commissioner,	
PA Dept. of Corrections,	**CAPITAL CASE**
Et al.,	

OPINION

On April 19 through April 21, 1993, the Honorable Judge Robert E. Kunselman of the Court of Common Pleas of Beaver County presided over the non-jury guilt phase of Petitioner Andre Stevens' trial on two counts of first-degree murder in the homicides of his estranged wife, Brenda Jo Stevens, and her acquaintance, Michael Love. At the conclusion of that proceeding, the trial court convicted Stevens guilty on each count of first-degree murder. A jury empaneled for a separate penalty hearing conducted on April 27 through April 30, 1993, sentenced Stevens to death.

At issue today is Stevens' Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254. (See dkt. 7). He argues that the proceedings against him were infected with federal constitutional error and that he is entitled to a new trial or, at a minimum, a new sentencing hearing. In support, he presents fourteen claims and numerous sub-claims for relief. First, I will address his claim alleging constitutional error during the jury selection process. He contends that he is entitled to a new sentencing hearing because the trial court improperly excluded a prospective juror

for cause based upon her general objection to the death penalty. This claim is meritorious; therefore, he is entitled to a new sentencing hearing. Next, I will address Stevens' only claim alleging error regarding the guilt phase of his trial: that he received ineffective assistance of counsel because his trial attorney did not develop and present a diminished capacity defense to the charges of first-degree murder. I have determined that this claim does not warrant habeas relief.

My disposition of the above-cited claims and the conclusion that a writ of habeas corpus is issued with respect to the death sentences renders it unnecessary to address the remaining sentencing-phase claims; any relief Stevens could obtain on those claims would be cumulative.

FACTS AND PROCEDURAL HISTORY

The trial court summarized the evidence presented at Stevens' trial as follows:

> On February 8, 1992, [Stevens] was a customer at Armando's bar, a local drinking establishment. He was seated at the end of the bar closest to the entrance. Sometime before 1:00 a.m., his estranged wife, Brenda Jo Stevens, entered the establishment with friends. She proceeded past [Stevens] and sat near the end of the dance floor with Michael Love, an acquaintance whom she had met a few months before, and they began dancing.
>
> [Stevens] saw them dancing together, left the bar, went to his car which was parked across the street, and secured a nine

millimeter semi-automatic pistol loaded with hollow point bullets. He returned to the bar and walked across the dance floor area to the rear of the bar, cocking the gun as he proceeded. As the two victims were leaving the dance floor in different directions, [Stevens] opened fire on them. He fatally shot his estranged wife twice in the head. He turned on Michael Love and began firing a series of shots into Love's body. After a brief pause, he fired a final shot into Love's scrotum area. [Stevens] then calmly left the bar.

While [Stevens] was shooting the two victims, the bar was occupied by many patrons and employees, some of whom where in close proximity. They were all forced to scatter or find hiding places, including a bartender who was trapped behind the bar during the siege. At least one bullet was retrieved from a bar stool which was occupied by a patron. This particular witness later noticed a bullet hole in her jacket, which had been hung on the bar stool.

Although Brenda Jo Stevens died quickly, Michael Love remained in a state of consciousness while a friend futilely attempted to administer first aid. Love died as a result of the multiple wounds. The location and number of his wounds would have caused a great deal of pain. Several of his wounds were defensive in nature, inflicted when he raised his arms to deflect the attack.

(Dkt. 15, App. 11 at 1-2).

In February 1992, Stevens retained Wendell Freeland, Esquire, to represent him in his defense of first-degree murder charges. (See dkt. 16, App. 21 at 4). After representing the indigent Stevens for approximately nine months, in November 1992 Attorney Freeland withdrew as counsel for lack of funds. (Id.; see also id., App. 23 at 104-05). The trial court then appointed the Beaver County Public Defender's office to represent Stevens. Initially, Public Defender Knafelc handled the case, but by March 1993 Public Defender Wayne S. Lipecky, Esquire, assisted by Thomas C. Phillis, Esquire, assumed representation. (Id., App. 23 at 104-05).

The non-jury guilt phase of Stevens' trial commenced on April 19, 1993. The court convicted him on each charge of first-degree murder. (Dkt. 13, App. 2 at 595-59). The day after the guilty verdicts, Stevens' trial proceeded to the penalty stage. Over the course of the next several days, the parties selected the jury. (See dkt. 14, Apps. 3-4, 6). The penalty phase of the trial commenced on April 27, 1993. (Dkt. 15, App. 7). On April 29, 1993, the jury sentenced Stevens to death on each conviction of first-degree murder. (See dkt. no. 31, App. 6 at 91-93).

Stevens, still represented by Attorney Lipecky, filed a timely appeal to the Supreme Court of Pennsylvania. On January 18, 1996, the court, in a unanimous decision, affirmed Stevens' judgment of sentences. Commonwealth v. Stevens, 543 Pa. 204, 670 A.2d 623 (1996) ("Stevens I "). The Governor of Pennsylvania signed Stevens' death warrant on May 8, 1995, scheduling his execution for the week of June 2,

1995. The Supreme Court of Pennsylvania, upon Stevens' motion, stayed the execution on May 23, 1995, to enable him to file a petition for writ of certiorari to the Supreme Court of the United States. The Court denied the petition on October 7, 1996. Stevens v. Pennsylvania, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996). Accordingly, his conviction and sentence became final on that date. See e.g., Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir.2000). Upon the conclusion of his direct appeal, Stevens filed a *pro se* petition with the Court of Common Pleas of Beaver County seeking collateral relief under the Pennsylvania Post-Conviction Relief Act ("PCRA"). Ultimately, the PCRA court (which was presided over by Judge Kunselman) appointed Stevens' present counsel-attorneys from the Defender Association of Philadelphia-to represent him. On or around March 1997, they filed a counseled petition for PCRA relief. (See dkt. 15, App. 16). The PCRA court conducted hearings on January 26 through January 29, 1998. (See dkt. 16, Apps. 17-24).

Following the hearing, the PCRA court issued a decision denying Stevens relief on all claims. (Dkt. 17, Apps. 25-26). Stevens appealed to the Supreme Court of Pennsylvania. In a five to two decision, the court affirmed the denial of PCRA relief. Commonwealth v. Stevens, 559 Pa. 171, 739 A.2d 507 (1999) ("Stevens II").

After the Supreme Court of Pennsylvania denied PCRA relief, Stevens filed the instant Petition for Writ of Habeas Corpus with this Court.[1]

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[1] Stevens' petition was originally assigned to the Honorable Donald J. Lee. It was assigned to me upon Judge Lee's retirement. Before ruling on the petition, I

STANDARD OF REVIEW

Stevens filed his petition for habeas corpus relief after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132 § 104, 110 Stat. 1214, so that statute applies to his case. See Lindh v. Murphy, 521 U.S. 320, 326-27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). AEDPA restricts a federal court's authority to grant relief when a state court has previously considered and rejected the petitioner's federal constitutional claims on the merits. 28 U.S.C. § 2254(d). It provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the

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directed that the Respondents supplement incomplete portions of the state court record and also directed that the parties file supplemental legal briefs.

facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. § 2254(d).

The Supreme Court interpreted the standard set forth in § 2254(d)(1) for the first time in Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). First, it instructed that the federal court must decide exactly what is the applicable clearly established law determined by the Supreme Court. Williams, 529 U.S. at 390, 120 S.Ct. 1495; see also Hameen v. State of Delaware, 212 F.3d 226, 235 (3d Cir.2000). Next, the court must determine whether the state court's decision was "contrary to" or "an unreasonable application of" that law.[2] 28 U.S.C. § 2254(d)(1).

The Supreme Court also explained that the two clauses of § 2254(d)(1) have independent meaning: "[A] decision by a state court is 'contrary to' our clearly established law if it applies a rule that contradicts the governing law set forth in our cases or if it confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." Id. at 405-06, 120

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[2]The Third Circuit has held that a federal court's analysis of whether a state court's decision is "contrary to" or an "unreasonable" application of Supreme Court precedent under § 2254(d) may be amplified by decisions of inferior federal courts evaluating that Supreme Court precedent. Hardcastle v. Horn, 368 F.3d 246, 256 n. 3 (3d Cir.2004) (citing Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 890 (3d Cir.1999) (*en banc*)).

S.Ct. 1495. "[A] run-of-the mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case [does] not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Id. at 406, 120 S.Ct. 1495.

The Supreme Court further stated that the "unreasonable application" clause of § 2254(d)(1) permits a federal habeas court to "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts" of the petitioner's case. Id. at 413, 120 S.Ct. 1495. More recently, the Supreme Court has explained that when analyzing a state court decision under § 2254(d)(1)'s "unreasonable application" clause:

> [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied a Supreme Court case incorrectly. Rather, it is the habeas applicant's burden to show that the state applied that case to the facts of his case in an objectively unreasonable manner.

Price v. Vincent, 538 U.S. 634, 641, 123 S.Ct. 1848, 155 L.Ed.2d 877 (2003) (quoting Bell v. Cone, 535 U.S. 685, 699, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); citing Williams, 529 U.S. at 411, 120 S.Ct. 1495; Woodford v. Visciotti, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)) (internal quotations, citations, and brackets omitted).

Although the Supreme Court has yet to address the precise scope of § 2254(d)(2), the Court of Appeal

for the Third Circuit has interpreted that section to require a review of the record to determine whether the state court's findings were unreasonable in light of the state court record. See e.g., Williams v. Price, 343 F.3d 223, 234 (3d Cir.2003)

Importantly, § 2254(d)(1) and (2) do not apply to all cases that otherwise fall within AEDPA's reach. The introductory sentence of § 2254(d) explicitly limits its application to only those claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). "An 'adjudication on the merits' has a well settled meaning: a decision finally resolving the parties' claims, with *res judicata* effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground." Rompilla v. Horn, 355 F.3d 233, 243 (3d Cir.2004), rehearing denied, 359 F.3d 310 (3d Cir.2004) (internal quotations and citations omitted). "[A] state court may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever." Id. at 247 (citing Weeks v. Angelone, 528 U.S. 225, 237, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000); Chadwick v. Janecka, 312 F.3d 597, 605-07 (3d Cir.2002), cert. denied, 538 U.S. 1000, 123 S.Ct. 1914, 155 L.Ed.2d 828 (2003)). However, if the state court has not reached the merits of a claim thereafter presented to a federal habeas court, the standard of review set forth in § 2254(d) does not apply. Id. at 248; see also Appel v. Horn, 250 F.3d 203, 210 (3d Cir.2001). In such cases, the court should exercise "pre-AEDPA independent judgment." Hameen, 212 F.3d at 248; see also Appel, 250 F.3d at 210. "But if the state court decided the claim, the § 2254(d)[ ] standards govern-regardless of the length, comprehensiveness, or quality of the state court's

discussion." Rompilla, 355 F.3d at 248 (citations omitted).

Finally, under § 2254(e)(1) the state courts' factual findings are presumed correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. Rompilla, 355 F.3d at 252-53 (citing 28 U.S.C. § 2254(e)(1)); Appel, 250 F.3d at 210 (same).

JURY SELECTION

I. Was the Jury Before Which Stevens Was Sentenced Improperly Death Qualified, Entitling Him to a New Penalty Hearing?

Stevens contends that he is entitled to a new sentencing hearing because he was denied an impartial capital-sentencing jury, in violation of his Sixth and Fourteenth Amendment rights. He claims that the trial court's exclusion for cause of a veniremember who had merely expressed her personal opposition to the death penalty violated Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In that case, the Supreme Court held that a sentence of death cannot be carried out if the jury that imposed it was chosen by excluding potential jurors for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. Id.

A. Factual Background

Stevens bases his claim upon the following exchange between the trial court and the veniremember during *voir dire,* which he claims was insufficient to justify her excusal for cause:

> The Court: As you know you are being considered as a juror in a case involve [sic] the deaths by homicide of Brenda Jo Stevens and Michael Love···· The Defendant is Andre Stevens and the Commonwealth has secured a verdict of guilty of murder of the first degree with respect to both of those deaths. It is now up to a jury to determine whether to impose the penalty of death or the penalty of life imprisonment upon Mr. Stevens. Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?
>
> A. I don't believe in the death penalty.
>
> The Court: Very well.
>
> Mrs. Dukovich [prosecutor]: Challenge for cause, Your Honor.
>
> The Court: Very well. You are excused, thank you.

(Dkt. 14, App. 3 at 160-61).

B. Standard of Review

Stevens raised this same claim during the PCRA proceedings. The Supreme Court of Pennsylvania denied it on the merits, deferring to the trial court's assessment of the veniremember's alleged bias.[3]

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[3] In ruling on this claim, the Stevens II court stated that "it accept[ed] the statement of the trial court in its [PCRA] opinion when it stated that its decision not to

Stevens II, 739 A.2d at 521. Because the state court adjudicated this claim on the merits and because the determination challenged in this claim is a factual one, § 2254(d)(2)'s standard of review applies. Martini v. Hendricks, 348 F.3d 360, 363 (3d Cir.2003). Accordingly, this Court must decide whether the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts[.]" 28 U.S.C. § 2254(d)(2). Also relevant to this analysis is § 2254(e)(1)'s presumption that a state court's factual determination of bias is presumed to be correct, rebuttable only upon a showing of clear and convincing evidence.[4] *Id.*

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conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question." 739 A.2d at 521. In ruling on this claim, the PCRA court (Judge Kunselman) noted that, while it had "no specific recollection" of the veniremember at issue, her demeanor must have "clearly conveyed her unwillingness to comply with the court's instruction," or it would not have dismissed her for cause. (Dkt. 17, App. 26 at 52).

[4] As an analytical matter, the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear, and the question of how to harmonize these two provisions has troubled some courts and commentators alike in the years since AEDPA's passage. See e.g., Randy Hertz & James S. Liebman, I Federal Habeas Corpus Practice and Procedure § 20.2c (4th ed. 2001 & Supp.2003); Larry W. Yackle, Federal Evidentiary Hearings Under the New Habeas Corpus Statute, 6 B.U. Pub. Int. L.J. 135, 140-41 (1996); see also Breighner v. Chesney, 301 F.Supp.2d 354 (M.D.Pa.2004). The Third Circuit has not expressly examined the relationship of the two provisions *inter se*, but has applied them together when

C. Legal Analysis

In Witherspoon, a direct appeal from a criminal conviction, the Supreme Court concluded that if a trial court excuses potential jurors for cause simply because they "expressed qualms about capital punishment," 391 U.S. at 513, 88 S.Ct. 1770, the jury obtained would not be the impartial jury required by the Sixth Amendment, but rather one "uncommonly willing to condemn a man to die." Id. at 521, 88 S.Ct. 1770. It held: "a sentence of death cannot be carried out if the jury that imposed it or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty[.]" Id. at 522, 88 S.Ct. 1770.

Recognizing, however, that jurors so opposed to capital punishment that they would not follow their oaths and the trial court's instructions might frustrate the state's legitimate interest in administering constitutional capital-sentencing schemes, the Court acknowledged that a trial court may properly exclude a potential juror for cause if the prosecution satisfies its burden of showing through *voir dire* that the individual

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reviewing a state court's adjudication of a Witherspoon claim. Martini, 348 F.3d at 363. Accordingly, this Court shall do the same. Moreover, I need not determine the exact contours of the relationship between § 2254(d)(2) and (e)(1) because the state court's factual determination has been shown to be incorrect by "clear and convincing evidence" and reflects an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

would not apply the law to the facts because of bias against capital punishment (properly death qualifies the jury). Wainwright v. Witt, 469 U.S. 412, 423, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (citing Reynolds v. United States, 98 U.S. 145, 157, 25 L.Ed. 244 (1878)). Importantly, however, the Court in Witherspoon held that the state's power to exclude did not extend beyond its interest in removing those individuals who would not set aside their beliefs and apply the law to the facts because of a bias against capital punishment. With this acknowledgment in mind, the Court in Wainwright v. Witt, a case decided in the context of federal habeas corpus review, clarified the limitation standard set forth in Witherspoon. In that decision, the Court explained that a trial court may properly excuse a juror for cause if that individual's opposition to capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with this instructions and his oath." Witt, 469 U.S. at 412, 105 S.Ct. 844.

The Third Circuit applied the Witherspoon/Witt standard in Szuchon v. Lehman, 273 F.3d 299 (3d Cir.2001). In that case, the prosecutor had asked a potential juror named Rexford during *voir dire* whether, if the evidence supported a first-degree murder conviction, he would "have any conscientious scruple or hesitation to find [Szuchon] guilty of first degree murder?" Szuchon, 273 F.3d at 329-30. Rexford answered: "I do not believe in capital punishment." *Id.* The prosecutor next asked: "You do not believe in capital punishment?," to which Rexford responded: "No." Id. at 330. The prosecutor immediately challenged Rexford for cause, defense counsel did not object, and the challenge was granted. Id. On these facts, the Third Circuit found a Witherspoon error. Id. It stated:

Rexford's mere lack of belief in capital punishment was a "broader basis" for exclusion than inability to follow the law. Indeed "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176[, 106 S.Ct. 1758, 90 L.Ed.2d 137] (1986). Neither the Commonwealth nor the trial court, however, questioned Rexford about his ability to set aside his beliefs or otherwise perform his duty as a juror. As a result, there was no evidence or even a suggestion that Rexford would act in a biased fashion due to his lack of belief in capital punishment, and the trial court, therefore, failed in its duty to determined that there was a proper basis for the exclusion···· Thus, while we begin with the presumption that the trial court's determination of bias is correct, that presumption cannot adhere in the absence of record support for the exclusions.

....

···The prosecutor failed ··· to meet his burden under Witt of asking even a limited number of follow-up questions to show that Rexford's views would render him biased.

Thus, the only supportable inference on this record is that Rexford

> was excluded because he voiced general opposition to the death penalty. Rexford also did not "express unwillingness" to impose the death penalty. He merely stated that he did not "believe" in capital punishment, which is by no means the equivalent of being unwilling to impose it. Again, even those firmly opposed to the death penalty can serve as jurors if they are "willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart, 476 U.S. at 176, 106 S.Ct. 1758[.]

Id. After determining that Rexford's exclusion violated Szuchon's rights under Witherspoon, the Third Circuit granted him habeas relief, entitling him to a new sentencing hearing.

The Respondents, while admitting that "[o]n first glance it might appear that [Szuchon] mandates relief[,]" argues that it is distinguishable on two bases. (See dkt. 26 at 14-17). First, Respondents correctly note that AEDPA's amendments to the federal habeas statute did not apply in Szuchon because the petitioner had filed his initial habeas petition prior to its enactment. See Szuchon, 273 F.3d at 312. They then argue that Stevens has not overcome AEDPA's "different and greater standard of deference[.]" (Dkt. 26 at 14).

Their argument is unpersuasive. Even prior to AEDPA's enactment, federal habeas corpus law provided a large measure of deference to the type of state court factual determinations that are at issue in this claim. In Witt, decided in 1985, the Supreme Court emphasized that considerable deference was to be given

to the trial court's first-hand evaluation of the potential juror's demeanor. 469 U.S. at 426-35, 105 S.Ct. 844. Pre-AEDPA, a state court's factual findings were presumed correct unless they were not "fairly supported by the record." Id.; Szuchon, 273 F.3d at 312. In practice that is the same standard that federal courts apply to a decision adjudicated on the merits in a state court and based on a factual determination, which now is reviewable under 28 U.S.C. § 2254(d)(2). See e.g., Lam v. Kelchner, 304 F.3d 256, 266 (3 Cir.2002) (applying AEDPA: "[W]e must ascertain whether the record supports the court's factual findings···· If the record supports the [state] court's findings, we may only reverse if the court drew an erroneous legal conclusion from the facts."); see also Gall v. Parker, 231 F.3d 265, 331 (6th Cir.2000) (cited with approval in Szuchon, 273 F.3d at 328) (applying AEDPA and reviewing merits of Witherspoon claim by determining whether the factual record "fairly support[s]" the trial court's determination of bias).

Section 2254(e)(1) does add another layer of review to factual determinations-requiring that they be presumed correct absent "clear and convincing evidence" to the contrary-but that standard is not insurmountable. As the Supreme Court recently stated:

> Even in the context of federal habeas, deference does not imply the abandonment or abdication of judicial review. Deference does not be definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise

was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003).

Moreover, federal courts conducting review under § 2254(e)(1) still examine the state record to find support for the state court's factual determinations. In the recent decision of Martini v. Hendricks, 348 F.3d 360 (3d Cir.2003), the Third Circuit applied § 2254(e)(1)'s presumption of correctness to the petitioner's Witherspoon challenge to the trial court's finding of bias. The Martini court instructed that to determine whether a petitioner has overcome § 2254(e)(1)'s presumption of correctness "it is crucial to examine the transcript in detail." Id. at 364. It ultimately concluded that the *voir dire* transcript did not reveal clear and convincing evidence that the trial court's factual finding was incorrect, but it reached that conclusion only after reviewing the lengthy questioning of the potential juror, Valdyka, who vacillated repeatedly about whether he could vote to impose the death penalty. Id. at 364-68. Yet, even with the thorough questioning and all of Valdyka's equivocal responses, the Martini court still considered the petitioner's claim that he had overcome § 2254(e)(1)'s presumption of correctness to be a "close and difficult" one. Id. at 362. Martini also highlights that, while a judge may rely on an assessment of the potential juror's demeanor to determine bias, even under AEDPA's standards of review there must be some actual support reflected in the record to support the conclusion that the potential juror would not be able to set aside his or her bias against the death penalty and apply the law as instructed by the trial court. Id.; see

also Gall, 231 F.3d at 331. In this case, there is no such support.

The Respondents next argue that Szuchon is distinguishable because in that case Rexford was not asked, as the veniremember was here, whether he could follow the court's instructions. This argument also is unconvincing. While the question posed by the trial court in Szuchon was phrased differently than that at issue here, the trial court in that case did ask Rexford whether, if the facts and the law warranted, he could convict the defendant of first-degree murder. In effect, the trial court asked Rexford whether he had any beliefs that would interfere with him imposing one of the possible penalties for first-degree murder: a sentence of death. That is exactly how Rexford interpreted the question, because he answered: "I do not believe in capital punishment." Szuchon, 273 F.3d at 329-30.

As with Rexford in Szuchon, the veniremember in this case expressed only her general opposition to capital punishment. (See dkt. 14, App. 3 at 161). She indicated that general opposition in response to the trial court's compound question:

> Q. Do you [1] have an opinion about the death penalty [2] which would prevent you from following the Court's instructions as to what penalty should be imposed?

(Id.) She, like Rexford in Szuchon, "interpreted the question as seeking [her] views on capital punishment." Szuchon, 273 F.3d at 330. And, as a result, she answered only the first part of the question, stating: "I do not believe in the death penalty." (Dkt. 14, App. 3 at 161).

Here, as in Szuchon, after the veniremember expressed her general opposition against the death penalty, the prosecutor did not ask any additional questions to probe whether the veniremember could set aside her opposition to capital punishment and apply the law. And, she never stated, or equivocated about whether, she could set aside her beliefs and apply the court's instructions. Compare Witt, 469 U.S. at 434, 105 S.Ct. 844 (where the Court determined that the juror was properly struck because she repeatedly "affirmed that her beliefs would interfere with her sitting as a juror[.]"); with Szuchon, 273 F.3d at 330 (Lockhart, 476 U.S. at 176, 106 S.Ct. 1758); Gall, 231 F.3d at 330-331. Instead, the trial court granted the prosecution's immediate request that she be excused for cause. As a result, the "prosecutor failed ··· to meet [her] burden ··· of asking even a limited number of follow-up questions" to demonstrate bias. Szuchon, 273 F.3d at 331.

Respondents have not directed this Court to any authority in which the prosecution met its burden of exclusion under Witherspoon/Witt with so little questioning. In Gall v. Parker, 231 F.3d 265 (6th Cir.2000) (post-AEDPA case; cited with approval in Szuchon), the Sixth Circuit granted the petitioner habeas relief on his Witherspoon claim, and the questions posed to the potential juror, Correll, in that case were considerably more probative of bias than the one question at issue here. In that case, "the prosecuting attorney had failed to elicit a definite answer as to whether Correll's conscience would permit him to 'consider the death penalty as is required by law.' " Gall v. Commonwealth, 607 S.W.2d 97, 103 (Ky.1980). Then, the trial court asked him, and he answered, as follows:

Q. Would your feelings absolutely preclude you from imposing a sentence of death under any circumstances, any circumstances that you could think of?

A. I just don't know, sir, whether it would or would not, really.

Next, the defense counsel asked:

Q. Mr. Correll, the court, in essence, is asking you if there is any case where you would consider imposing the death penalty. For instance, if Hitler were on trial here today for killing all the Jews, you could consider imposing the death penalty in that case couldn't you?

A. I would be undecided, sir. At this point.

Id. In granting the petitioner federal habeas relief on his subsequent Witherspoon claim, the Sixth Circuit court noted that Correll stated that his mind was not "closed" to imposing the death penalty, "just undecided." Gall, 231 F.3d at 331. He also stated that he would "very possibl[y]" feel the death penalty was appropriate in certain factual scenarios. Id. Based upon that testimony, the *Gall* court determined that Correll:

> was not "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its" death penalty scheme [.]··· [U]nlike the juror who

> was properly struck in *Witt* because she repeatedly "affirmed that her beliefs would interfere with his sitting as a juror," ··· Correll not once stated that his beliefs would deter him from serving as an impartial juror. Correll's exclusion was thus error.

Id.

Finally, the lack of any additional questioning of the veniremember in this case makes it distinguishable from Martini. There, the potential juror, Vladyka, stated during *voir dire* that he did not believe in the death penalty. Id. at 364. He then answered "No" in response to the question of whether he thought "there are any crimes where the death penalty is an appropriate penalty?" Id. The Martini court noted that Vladyka's "mere personal opposition to the death penalty," as reflect in that point of the *voir dire* transcript, was insufficient to warrant his excusal for cause. It then proceeded to review the lengthy follow-up questions posed by the trial court, the prosecutor, and the defense counsel as to whether Vladyka could separate his personal beliefs in opposition to the death penalty from the task at hand. Id. at 364-66.

In response to the trial court's question of whether he could impose the death penalty if the facts of the case and the law required that it be imposed, Vladyka responded: "Yes, sir." Id. at 364. Later, however, he qualified this assurance. The prosecutor asked him if he "would ··· be able to consider imposing the death penalty?," to which he answered: "I guess so." Id. at 365. Retreating even further from that stance, in response to the prosecutor's question: "Can you make the weighing process and would you be able to say in open Court John Martini should get the death

penalty?," Vladyka answered: "I don't know ··· It's a hard question." Id. Similarly, when questioned by the public defender: "are you capable in the proper circumstance to send John [Martini] to death row?" he replied, "I guess if everything was in place and I believed in it, I mean, you know it is hard to say yes or no." Id.

The trial court, faced with Vladyka's equivocal responses, excused him for cause. Id. at 366-67. As noted above, after reviewing the *voir dire* transcript and finding support in the record for the trial court's factual determination of bias, the Martini court denied habeas relief on the Witherspoon claim. Id. at 367-68. But in contrast to that case, in the instant case there was no equivocation; no "I think so," "I don't know," or "I guess so." Here, the veniremember made only one statement: "I don't believe in the death penalty." Even through the lens of AEDPA's standards of review, the trial court's assessment of bias on that statement alone amounts to constitutional error.

Accordingly, I am constrained to conclude that the state court's finding of bias upon the part of the veniremember at issue was unreasonable within the meaning of § 2254(d)(2), and, that on the existing record Stevens has rebutted the "presumption of correctness" accorded to that finding under § 2254(e)(1). Because a violation of Witherspoon is reversible error not subject to harmless error analysis, see e.g., Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987); Davis v. Georgia, 429 U.S. 122, 123, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) (the improper exclusion of one veniremember out of eighty-three was reversible error), Stevens is entitled to

a new sentencing hearing.[5] See Szuchon, 273 F.3d at 331.

GUILT PHASE

II. Did Stevens Receive Ineffective Assistance of Counsel at the Guilt Phase of His Trial?

Stevens raises a single claim for relief from his convictions of first-degree murder: that he received ineffective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights because Attorney Lipecky allegedly failed to investigate, develop and present a diminished capacity defense to the charges of first-degree murder.[6]

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[5] Stevens also raises a claim that Attorney Lipecky was ineffective in failing to object to the veniremember's exclusion and for not raises his ineffectiveness on direct appeal. Because I find a violation of Witherspoon *per se*, I need not reach the ineffective assistance of counsel claim. See Szuchon, 273 F.3d at 329 n. 18.

[6] Pennsylvania law recognizes the diminished capacity defense "to show that a defendant did not have the capacity to possess the state of mind required by the legislature to commit a particular degree of the crime charged." Zettlemoyer v. Fulcomer, 923 F.2d 284, 295 (3d Cir.1991) (citing Commonwealth v. Walzack, 468 Pa. 210, 360 A.2d 914, 919-20 (1976)). It is an extremely limited defense. Id.; see also Commonwealth v. Davis, 331 Pa.Super. 59, 479 A.2d 1077, 1080 (1984). A defendant invoking the defense concedes general criminal liability and must prove that his mental condition at the time of the offense was such

In support of this claim, Stevens contends that Attorney Lipecky did not expand upon Attorney Freeland's preliminary investigations and also failed to effectively use the contents of Attorney Freeland's files. Specifically, Stevens identifies the following four types of information that he claims his counsel possessed and failed to expand upon and effectively use, or failed to investigate and present: (1) a twenty-two page "journal" kept by Stevens prior to the murders, which he claims demonstrated that he was mentally ill at the time of the crimes; (2) letters Stevens had written to Attorney Freeland that demonstrated paranoid and delusional thinking; (3) complete military, employment, and school records detailing Stevens' history of mental health problems, and (4) information from Stevens' daughter and two sisters detailing his difficult childhood, medical history, and troubled life. (Dkt. 29 at 3-4). He also contends that had his counsel properly used and developed this information, the defense would have had available to it expert mental health testimony that would have established that he was psychotic at the time of the offenses, suffers from, and suffered at that time, organic brain damage, severe depression, and disordered thinking. (Dkt. 7, ¶ 7-8).

A. Factual Background

As set forth above, following his arrest Stevens retained Attorney Freeland to represent him. (See dkt. 16, App. 21 at 4). In gathering information to prepare for the defense of his client, Attorney Freeland spoke with Karen Mangieri, the daughter of the petitioner and Brenda Jo. (See id. at 7-8). Attorney Freeland's notes

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that he was incapable of forming the specific intent to kill. Id.

reflect that Mangieri asked him if anyone was going to evaluate her father, because she thought he was "crazy." (Id.; see also dkt. 30, App. 1, PCRA Ex. AA). In addition to his notes, Attorney Freeland's file also contained a twenty-two page journal that Stevens had maintained prior to the homicides, his partial military and employment records, and three letters that he had written to Attorney Freeland after the crimes. (See dkt. 30, App. 1, PCRA Exs. BB, CC, DD).

In August 1992, when Stevens was still represented by Attorney Freeland, the Commonwealth retained psychiatrist Dr. Christine Martone for the purpose of evaluating Stevens to determine if he was competent to stand trial. (Trial Tr. 4/28/1993 at 41). On August 24, 1992, Dr. Martone issued her report. In it, she stated:

> The defendant is competent to stand trial. He understands the charges against him and is able to cooperate in his own defense. The defendant does not suffer from a psychotic disorder and in my opinion there is no evidence that this defendant fulfills the criteria of the McNaught [sic] definition of not guilty by reason of insanity. He certainly was able to appreciate the nature and quality of his act and the wrongfulness of it. Concerning the issue of guilty but mentally ill, again, the defendant is not now and was not at the time of the incident suffering from a psychotic disorder. He was preoccupied with his wife. He was not able to accept the divorce and had certain personality disorder traits. However, he did not lack, in my opinion, the ability to appreciate

> the nature and quality of his act and the wrongfulness of it, nor was he unable to conform his behavior to the norms of society.

(Dkt. 32, PCRA Ex. V).

In November 1992, after representing the indigent Stevens for approximately nine months, Attorney Freeland withdrew as counsel for lack of funds. (Dkt. 16, App. 21 at 4; App. 23 at 104-05). The trial court appointed the Beaver County Public Defender's office to represent Stevens and by March 1993, Attorney Lipecky assumed representation. (Id., App. 23 at 104-05). Soon thereafter, counsel filed a motion for the appointment of a psychiatrist and psychologist to assist the defense. (Dkt. 31, App. 5). On March 9, 1993, the trial court granted the defense's motion (id.), and Attorney Lipecky retained psychiatrist Rodney Altman, D.O., to conduct a mental-health examination of Stevens.[7] (See dkt. 16, App. 23 at 108-109).

Dr. Altman, a board-certified psychiatrist, conducted his initial examination of Stevens on March 29, 1993. (Dkt. 15, App. 9 at 12; dkt. 16, App. 24 at 4). He then contacted psychologist Ralph E. Landefeld, Ph.D., to assist him in his evaluation by performing psychological tests on Stevens. (Dkt. 16, App. 17 at 9).

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[7]After the conclusion of the guilt phase, Attorney Lipecky retained a second psychiatrist, Dr. Martone, to assist the defense in developing expert mental health mitigating evidence. She was the doctor that the Commonwealth had previously retained to conduct a competency evaluation on Stevens in August 1992.

Dr. Landefeld performed a psychological screening of Stevens, which consisted of a clinical interview and also the administration of several psychological tests, including the Minnesota Multiphasic Personality Inventory-2, the Rorschach Test, the Benton Test of Visual Retention, and the Trail Making Test. (Id., App. 17 at 10-12).

Dr. Altman and Dr. Landefeld determined that Stevens was not psychotic and was not exhibiting any schizophrenic illness. (See e.g., id., App. 24 at 112). In his report, issued on or around April 9, 1993, Dr. Landefeld diagnosed Stevens as having an: "Adjustment Reaction, with depressed mood" and "Paranoid Personality Disorder, with borderline and antisocial traits." (Dkt. 30, App. 1, PCRA Ex. H). Dr. Landefeld verbally informed Dr. Altman of the results of his testing, and then Dr. Altman examined Stevens for a second time. (Dkt. 16, App. 24 at 11; see also dkt. 30, App. 1, PCRA Ex. O). On April 15, 1993, Dr. Altman issued his report. In it, he concluded:

> DISCUSSION AND FORMULATION:
>
> Mr. Stevens is an individual who has had a long history of emotional distrubance [sic] first recognized in his early teens while in the military and evidencing paranoid traits, schizoidal and isolative tendencies as well as possible overt psychosis. He has continued to have symptomatology within the same realm. Although a large gap from his teens until his mental health commitment in 1972 is lacking, he again in 1972 evidences paranoid and quasi delusional thinking as well as impulse discontrol.

CURRENT MENTAL STATUS EXAMINATION:

Evidences continuing paranoid ideation as a predominate feature with periods of projection and externalization onto others as plotting in some way against him. He has difficulty in focus, continues to have tangential and circumstantial thought process and resultant difficulty in modulating his impulses when faced with either real or an imagined threatening situation. Individuals such as Mr. Stevens can, at times of acute emotional turmoil, misperceive reality and can lack the ability to modulate their emotions with impulsive acting-out behavior. His current ambivalence and apathy are secondary to being within a very structured and regimented environment, namely jail, but do not alleviate the continued core problem of a relatively severe personality disorder consisting of paranoia, mood fluctuations, difficulties in judgment as well as rationalized disregard and retribution for and against others as a result of his continued paranoid personality.

It is my opinion that given Mr. Stevens overall mental defects that when removed from a rigid and structured environment and placed under severe mental duress that he could decompensate and misperceive reality as well as act out impulsively in a manner perceived by him to protect his own well-being from the

aggressions of either direct or indirect of others.

(Dkt. 30, App. 1, PCRA Ex. O).

The guilt phase of Stevens' trial commenced on April 19, 1993. Attorney Lipecky, believing that Stevens would "undoubtedly" be found guilty of first-degree murder, advised his client to waive his right to a jury during the guilt stage of his trial. (Dkt. 16, App. 23 at 95-97). According to Lipecky, this strategy was pursued in the hopes that the defense would be able to limit the evidence submitted by the Commonwealth during the penalty phase of his trial, which would be conducted before a jury, to only that which was relevant to the aggravating circumstances and thereby prevent the introduction of the more inflammatory details of the double homicide. (Id. at 96-98, 103). Attorney Lipecky also explained that another critical reason for proceeding with a non-jury guilt trial was that Stevens did not show remorse for his crimes. (Id. at 119).

Stevens testified in his own defense. (Dkt. 13, App. 2 at 490). He described his troubled marriage, explained that he and his wife were in the process of divorcing and that he became enraged when he saw her dancing with Love at Armando's bar. (Id. at 528-530). He further testified that he left the bar, went to his car, retrieved his pistol, cocked it three times, hid it under his clothing and then went back into the bar. (Id. at 530-31). He admitted that he shot and killed both his estranged wife and Love. (Id. at 525, 532-33).

Stevens' principal defense at the guilt phase was that he lacked the requisite *mens rea* necessary to convict him of first-degree murder. However, Dr. Altman and Dr. Landefeld had not provided the defense

with any expert mental health evidence to support the defense. Nevertheless, Attorney Lipecky argued to the court during closing arguments that:

It is [Stevens'] position that [his] state of mind, which has evolved for 27 years and many, many, many stressful situations, prevented him from forming the necessary intent to kill in order for him to be convicted of first degree murder.

...

[Stevens] is a man who has been troubled virtually all his life. He had a psychiatric condition while a young man in the Navy. He had already developed a paranoia personality disorder by that time. He is not insane. The question again for the Court to decide is whether he could form the necessary intent to commit first degree murder based on his perception that he had amassed over 27 years of marriage with his wife, separation after separation, charges of infidelity, drug use, alcohol abuse, real or imagined lead him inevitably to destruction of his wife and Michael Love who is placed in this tragic situation through no fault of his own. This in no way vindicates the actions of [Stevens] on February 8, 1993[sic]. He is guilty of homicide but not of murder in the first degree.

(Id. at 585-86). The trial court rejected this defense, and convicted Stevens on each charge of first-degree murder. (Id. at 595-69).

B. Legal Analysis

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set out two components to a Sixth Amendment claim for ineffective assistance of counsel. See also Wiggins v.

Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); Williams, 529 U.S. at 390-91, 120 S.Ct. 1495. The first prong of the Strickland test requires a defendant to establish that his attorney's representation fell below an objective standard of reasonableness by committing errors so serious that he or she was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 688, 104 S.Ct. 2052; Wiggins, 123 S.Ct. at 2535. Obviously, when a petitioner claims that his counsel failed to raise a claim that the court determines to be meritless, habeas relief under Strickland is not available. See id. at 691, 104 S.Ct. 2052 (the failure to pursue "fruitless" claims "may not be challenged as unreasonable.") A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the petitioner must overcome the presumption that, under the totality of the circumstances, the challenged action "might be considered sound trial strategy." Id. at 689, 690-92, 104 S.Ct. 2052. The question is not whether the defense was free from errors of judgment, but whether counsel exercised the customary skill and knowledge that normally prevailed at the time and place. Id.; Rompilla, 355 F.3d at 258-59.

The second prong under Strickland requires a petitioner to demonstrate that counsel's errors prejudiced the defense. Id. at 692. To prove prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Wiggins, 123 S.Ct. at 2542.

At the time the state courts reviewed this claim, Strickland's familiar two-prong test was the "clearly established federal law" applicable to ineffective assistance of counsel claims. And, the Supreme Court of Pennsylvania had expressly stated that the standard for judging ineffective assistance of counsel claims under its law was identical to the standard enunciated by the Supreme Court of the United States in Strickland. See e.g., Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973, 975-77 (1987); see also Rompilla, 355 F.3d at 248. Accordingly, federal courts conducting habeas review upon ineffective assistance of counsel claims *that have been adjudicated on the merits* by a Pennsylvania state court do so pursuant to AEDPA's § 2254(d)(1)'s standard of review.[8] See e.g., Rompilla, 355 F.3d at 248-49; Werts v. Vaughn, 228 F.3d 178, 202-04 (3d Cir.2000); Pursell v. Horn, 187 F.Supp.2d 260, 340 (W.D.Pa.2002) (Smith, C.J.).

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[8]This is so even if the Pennsylvania court has not cited Strickland or any other federal cases, because it invariably cites to state precedent (or the progeny of state precedent), which relies on Strickland. Of course, the Supreme Court of the United States has made clear that citation or even awareness of its precedent is unnecessary as long as neither the reasoning nor the result of the state court decision contradicts it. Early v. Packer, 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam).

1. Deficient Performance

a. Standard of Review

Stevens raised this same claim during his PCRA proceedings. In its review of this particular claim, the Supreme Court of Pennsylvania stated that it need not determine whether trial counsel's conduct with regard to developing a diminished capacity defense amounted to constitutionally deficient performance because Stevens failed to show that he was prejudiced. Stevens II, 739 A.2d at 507. Because the Supreme Court of Pennsylvania did not adjudicate Strickland's deficient performance prong on the merits, § 2254(d)(1) does not apply, and this Court must conduct a *de novo* review of this portion of the *Strickland* analysis. Wiggins, 123 S.Ct. at 2542.[9]

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[9] As set forth above, § 2254(d) applies only to those aspects of a petitioner's claim that the state court has actually decided. In Wiggins, the Supreme Court reviewed the habeas petitioner's ineffective assistance claim. 123 S.Ct. at 2542. The state court had decided the deficient performance prong of the claim, but not the prejudice prong. After finding the state court's deficient performance decision unreasonable under § 2254(d)(1), id. at 2534-42, the Court turned to the prejudice prong. It gave *de novo* review to the prejudice analysis, noting that its "review [was] not circumscribed by a state court decision with respect to prejudice." Id. at 2542.

b. Counsel did not provide constitutionally deficient performance

In order to establish that he received ineffective assistance of counsel, Stevens must show that Attorney Lipecky's representation "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688, 104 S.Ct. 2052. Recognizing that the scope and intensity of defense counsel's investigation and development of defenses differs with the facts of each case, the Supreme Court in Strickland, "did not offer any special standards concerning the duty to investigate[.]" Stevens v. Delaware Corr. Ctr., 295 F.3d 361, 371 (3d Cir.2002) (citing Strickland, 466 U.S. at 691, 104 S.Ct. 2052). It did, however, state that in all cases, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. (quoting Strickland, 466 U.S. at 691, 104 S.Ct. 2052).

As set forth above, Stevens identifies four pieces or types of evidence that he claims trial counsel either (i) possessed but failed to provide to mental health experts or otherwise failed to effectively use or (ii) failed to develop and then provide to the mental health experts. I will address each *seriatim*.

(1) The journal

After Stevens' arrest, the Commonwealth seized from his home a twenty-two page handwritten "journal" that had been kept by him prior to the murders. (See dkt. 32, PCRA Ex. I). At the PCRA hearing, he presented expert mental health evidence to establish

that the journal reveals that at the time of the murders he was "szchizophrenic," disjointed," "under extreme emotional distress," "seriously mentally ill," "experiencing paranoid ideation," and was "psychotic." (Dkt. 16, App. 17 at 24; App. 22 at 16; App. 24 at 33-34, 45, 49).

Attorney Freeland received a copy of the journal from the Commonwealth, and he turned it over the to Public Defender's office, along with the rest of his file, when it assumed representation of Stevens. When Attorney Lipecky took over Stevens' case in March 1993, he reviewed the journal, and believed it reflected delusional thinking and perhaps contained evidence of psychosis. (Id., App. 23 at 25-26). Stevens contends that, despite surmising that the journal contained useful information, Attorney Lipecky did not give it to the defense's mental health experts. In support he directs this Court to Dr. Landefeld's, Dr. Altman's, and Dr. Martone's PCRA hearing testimony, in which each testified that s/he did not see the journal prior to the PCRA proceedings. (See id., App. 17 at 19-20; App. 22 at 14; App. 24 at 27, 35).

In analyzing the merits of this claim, it is necessary to recall an important point: only Dr. Altman and Dr. Landefeld served as the defense's mental health experts for the purpose of determining if Stevens had a mental health defense to the *charges* of murder. (Dkt. 16, App. 23 at 19; see also dkt. 30, App. 1, PCRA Ex. O). Dr. Martone was not retained by the defense until after the conclusion of the guilt phase. Thus, in reviewing whether Attorney Lipecky adequately prepared the mental health experts for the guilt phase, only his conduct with regard to Dr. Altman and Dr. Landefeld is relevant. Whether he provided Dr. Martone with the journal, as well as the other information at

issue here, is not probative of the adequacy of counsel's investigation into guilt-phase defenses.

With that point settled, I now consider Stevens' claim that Attorney Lipecky did not provide the journal to Dr. Altman and Dr. Landefeld. The PCRA court expressly rejected this contention and credited Attorney Lipecky's testimony to the contrary.[10] This Court is

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[10] Stevens asserts that the state courts did not find that any of the experts actually had the journal. (Dkt. 29 at 5 n. 7). That is not an accurate characterization of the PCRA court's findings. In considering the related claim of whether counsel provided ineffective assistance with regard to developing mitigating evidence, it determined:

> [T]rial counsel made a substantial effort to develop mitigating evidence. This conclusion is supported by the following facts.
>
> ....
>
> Upon Lipecky's motion, Dr. Altman, a psychiatrist whose work Lipecky was familiar with, was appointed by Order dated March 9, 1993. According to Lipecky, he was engaged prior to the start of the trial for the purpose of evaluating Appellant's mental health status, both in terms of competency and as it was at the time of the shootings. Although the defense was also interested in mitigation, they initially wanted to focus on the possibility of a psychosis which could give him a defense.
>
> ....

bound by that credibility determination. See Rompilla, 355 F.3d at 252-53; Weeks v. Snyder, 219 F.3d 245, 259 (3d Cir.2000). It must be presumed to be correct unless Stevens rebuts that presumption by clear and convincing evidence. *Id.* (quoting 28 U.S.C. § 2254(e)(1)).

Stevens has not met that burden. During the PCRA hearing, Attorney Lipecky testified that he talked to Dr. Altman about Stevens' journal and that as a result of their discussion, and at Dr. Altman's instructions, he hand delivered the journal to Dr. Landefeld. (Dkt. 16, App. 23 at 24-26, 110-116). The credibility of Attorney Lipecky's recollection was buttressed by a memorandum from him to Dr. Landefeld, dated April 5, 1993, in which he stated:

> ···Lipecky spent a considerable amount of time reviewing a lot of things with Dr. Altman, *including Appellant's handwritten notes [the journal.]* ··· Lipecky then consulted with Dr. Landefeld. Although Lipecky had his suspicions about the handwritten notes, he could not interpret it for purposes of diagnosing Appellant. Consequently, he hand-delivered them to Dr. Landefeld's office.

(Dkt. 17, App. 26 at 22-25) (emphasis in original) (internal citations omitted); see also id. at 27 ("[Attorney Lipecky] had given Dr. Altman information orally which included information contained in [Stevens'] handwritten notes···· He gave Dr. Landefeld's office [Stevens'] handwritten notes pursuant to Dr. Altman's request.")

> Dear Ralph:
> ...
>
> I am enclosing a 22 page document (?) which was taken from the defendant's residence by the Commonwealth as a result of a search warrant. I thought perhaps you would look at this to see if you can make something of it. If you need anything further, please call me[.]
>
> s/ Wayne S. Lipecky.

(Dkt. 32, PCRA Ex. I). Thus, the PCRA court's finding of fact that Attorney Lipecky had discussed the journal with Dr. Altman and provided it to Dr. Landefeld is supportable by the PCRA testimony. Accordingly, this Court is bound by that determination. 28 U.S.C. § 2254(e)(1). As a result, there is no merit to Stevens' claim that his counsel was ineffective for not providing the journal to Dr. Landefeld and Dr. Altman.

As if anticipating that conclusion, Stevens next argues that Attorney Lipecky provided ineffective assistance because he did not "ensure" that the journal was reviewed by the experts, ask them why it was not mentioned in their written reports, or otherwise question them about their conclusions regarding it. This argument has no merit. Attorney Lipecky admitted during the PCRA hearing that, after he had talked to Dr. Altman about the journal and hand delivered it to Dr. Landefeld's office, he did not ask either of them follow-up questions about it. His reasoning for that was simple: he had relied upon them to "to make whatever they could out of it." (Dkt. 16, App. 23 at 36). He "assumed that [the journal] was something that they had digested" and that they had reached their final diagnosis of Stevens after having reviewed it. (Id. at 44-

45). His explanation provides a reasonable basis for his decision not to ask the experts any further questions about the journal. Cf. Rompilla, 355 F.3d at 253.

With the benefit of hindsight, Attorney Lipecky admitted that there would have been no harm in asking Dr. Landefeld and Dr. Altman follow-up questions about the journal. (Dkt. 16, App. 23 at 32-33). Nevertheless, I can hardly say that counsel was unreasonable because he failed to do so. Here, Attorney Lipecky reasonably assumed that Dr. Altman and Dr. Landefeld would have notified him if they determined that the journal was useful to the defense; after all, they were the experts. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel's was unreasonable." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. That is why Strickland creates "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. In the present case, Stevens has failed to come forward with evidence to overcome that presumption.

In sum, the state court determined that Attorney Lipecky did provide the journal to Dr. Landefeld and Dr. Altman, and there is amble evidence in the record to support that finding. Moreover, Attorney Lipecky exercised reasonable professional judgment when he relied upon Dr. Landelfed's and Dr. Altman's judgment to point out to him the journal's usefulness to the defense, if any.

(2) Stevens' letters to Attorney Freeland

Next, Stevens argues that Attorney Lipecky provided him with ineffective assistance because he failed to provide the experts with several letters sent by him to his first counsel, Attorney Freeland. (See dkt. 29 at 5). In one letter, dated August 2, 1992, Stevens wrote to Freeland that he believed Michael Love "fired a shot at me first[.]" (Dkt. 30, App. 1, PCRA Ex. BB). In a letter dated October 19, 1992, Stevens once again stated that Love shot at him, and also discussed his belief that Brenda Jo was involved in drugs and that the police were somehow involved in trying to protect her and Armando's alleged illegal activities. (Id., PCRA Ex. CC). In another, undated letter, Stevens wrote to Freeland that he believed "there was a conspiracy to cause me harm." (Id., PCRA Ex. DD). Stevens contends that the accusations contained in the letters were unsubstantiated and demonstrated paranoid and delusional thinking and should have been provided to the defense experts.

Attorney Lipecky acknowledged that he did not provide the actual letters to the defense experts. (Dkt. 16, App. 23 at 75-78). He did, however, testify that he verbally related the contents of the letters to them. (Id.) In addition, he arranged for both Dr. Altman and Dr. Landefeld to conduct clinical examinations of Stevens, thus providing each with the opportunity to hear his client's delusional allegations for himself.[11] Based on all

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[11] Dr. Altman's report indicates that he was well aware of the unsubstantiated claims that Stevens was making after the murders about his wife and Michael Love, and of the paranoia and delusional thinking evidenced in the letters. (See dkt. 30, App. 1, PCRA Ex. O). There, he

of the foregoing, Stevens has failed to meet his burden of establishing that his counsel was constitutionally deficient for not providing the actual letters to the defense experts. Cf. Stevens v. Delaware Corr. Ctr., 295 F.3d at 371.

(3) Stevens' complete institutional and employment records

The file that Attorney Freeland provided to the Beaver County Public Defenders Office contained Stevens' partial military and employment records. Although Attorney Lipecky provided those partial records to Dr. Altman, and Dr. Landefeld was aware of

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noted that Stevens had told him about his belief that his wife was involved in drugs, that her alleged "numerous affairs were related someway to issues that he speculates but cannot be certain of[,]" and that he believed Love "pointed" a gun at him. (Id. at 1-3). He further detailed that Stevens "continues to have his story retold by himself in a paranoid and repetitive fashion, punctuated frequently with ideas of reference that his wife had been plotting against him···· He denied several times any past delusions or hallucinations but does tell me that he heard some type of voice telling him that the man who was dancing with his wife had a gun." (*Id.* at 6).

Dr. Landefeld's report also indicates that he was aware of Stevens' paranoia. (See id., App. 1, PCRA Ex. H). He noted that Stevens related to him that he (Stevens) heard "people talking about him and his wife and 'who she is with.' " (Id. at 2). Dr. Landefeld also stated that Stevens projected onto others blame for his actions. (Id.)

at least the partial military record's contents, Stevens argues that he nevertheless received constitutionally ineffective assistance because Attorney Lipecky did not seek and provide to the experts full military and employment records. (See dkt. 29 at 5-6). He also argues that Attorney Lipecky provided him with deficient representation because he did not obtain and provide to the experts his school records. (Id.)

Stevens has failed to show that Attorney Lipecky's conduct was constitutionally deficient for not providing a complete set of the documents at issue to the defense experts. First, neither Dr. Altman nor Dr. Landefeld testified at the PCRA hearing that he felt that the partial military and employment records Attorney Lipecky provided were too incomplete to be reliable or useful.[12] Second, Stevens has failed to identify any additional, beneficial, relevant information that was contained in the complete military or employment records that was not contained in the partial records or of which the experts were not already aware.[13]

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[12]In fact, Dr. Landefeld testified that it was "not unusual" to receive only partial military records. (Dkt. 16, App. 17 at 13).

[13] The *partial* military records that Attorney Lipecky provided to the defense's experts contained information about Stevens' mental health history. In his April 15, 1993 report, Dr. Altman noted that those records revealed that Stevens had been hospitalized for psychiatric problems when he was in the Navy, had been anxious and possibly hallucinated, and was diagnosed at that time as having, among other things, a schizoid personality and emotional instability reaction. (Dkt. 30, App. 1, PCRA Ex. O). At most, the complete records would have served to "buttress"

In sum, Stevens has failed to meet his burden of showing that his counsel's conduct on this point fell below Sixth Amendment standards. See Rompilla, 355 F.3d at 253-254 (holding that counsel did not act unreasonably in failing to provide certain school, medical, police and prison records to mental health experts where experts hired were highly qualified, performed their own tests and did not ask for such information and concluding that counsel's deference to expert was within the range of reasonable professional assistance); Card v. Dugger, 911 F.2d 1494, 1512 (11th Cir.1990) (same). However, even if Attorney Lipecky

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testimony concerning Stevens' already-identified depression, (see, dkt. 16, App. 17 at 14), and would have, in conjunction with some other collateral information first introduced at the PCRA hearing (including school records), indicated to them that a full battery of neuropsychological tests should be conducted. But, while a neuropsychological battery would have provided the defense with additional relevant expert mental health testimony for the sentencing phase, there is no evidence of record that, if such tests had been conducted, admissible guilt-stage testimony from either Dr. Altman or Dr. Landefeld would have been secured.

As for the employment records, Stevens claims that they showed that he had a "history of unusual behavior." (Dkt. 29 at 6). However, he has failed to direct this Court to any evidence that establishes that the employment records are in any way relevant to his claims. During the PCRA hearing, Stevens' counsel showed Dr. Altman his client's employment records, but Dr. Altman did not identify anything in the records that would have informed or affected his evaluation. (Dkt. 16, App. 24 at 86-87).

provided ineffective assistance on this point, this claim still fails because Stevens has not met his burden of showing that he was prejudiced at the guilt phase because the records at issue were not provided to the experts.

(4) Information from Stevens' family

Finally, Stevens argues that Attorney Lipecky provided him with constitutionally deficient assistance because he failed to develop his "social history" through interviews with his daughter, Karen Mangieri, and his sister Rosemary Postich, and also failed to interview his other sister, Constance Corbitt. According to Stevens, they could have provided the defense with information about his troubled childhood, difficult family life, and medical history, including a history of convulsions and head injuries.[14] (Dkt. 29 at 6).

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[14] Stevens also faults Attorney Lipecky for not providing a copy of Attorney Freeland's notes to the defense experts in which Freeland had jotted down several things, including: "Convulsions when infant-died," and "Battered husband syndrome." (See dkt. no. 32, PCRA Ex. Z). Stevens argues that the reference to convulsions was important and that the doctors should have been made aware of it. Attorney Lipecky provided a reasonable basis for not providing the note to the experts: he testified that when he reviewed the note, it was his impression that it was a reference to the charges Stevens was making about his wife abusing his daughter and grandchild-charges of which the experts were already aware. (Dkt. 16, App. 23 at 88). In any event, even if Attorney Lipecky should have provided the note to Dr. Altman and Dr. Landefeld, Stevens cannot show that he was prejudiced at the guilt phase of the trial for his counsel's failure to do so.

I need not determine the merits of this claim. Even if Attorney Lipecky provided ineffective assistance in failing to develop information from Stevens' family members, this claim still fails because Stevens has not met his burden of showing that he was prejudiced at the guilt phase because of the alleged deficient performance.[15]

2. Prejudice

a. Standard of Review

The Supreme Court of Pennsylvania adjudicated the merits of Strickland 's prejudice prong. Stevens II, 739 A.2d at 514-16. According, this Court must apply § 2254(d)(1)'s standard or review to that portion of the analysis.

b. Legal Analysis

In rejecting this part of Stevens' claim, the Supreme Court of Pennsylvania relied upon Judge Kunselman's determination that he, as the factfinder in Stevens' non-jury guilt trial, "would have still concluded that [Stevens] had the capacity to form the specific intent to kill at the time of the murders[,]"

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[15] The Court in Strickland noted that although it had discussed the performance component of an effectiveness claim prior to the prejudice component, there is no reason for an analysis of an ineffectiveness claim to proceed in that order. 466 U.S. at 697, 104 S.Ct. 2052. Consequently, if it is more efficient to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, this course should be followed. Id.

notwithstanding the evidence presented at the PCRA proceeding. Id. at 516. Stevens argues that the Supreme Court of Pennsylvania's decision on this point was "contrary to" Strickland under § 2254(d)(1) because its analysis was based upon an outcome determinative test, relying solely upon the "proclivities" of Judge Knuselman. (Dkt. 7 at 7-8).

Stevens' argument is one the merits of which I need not decide. Even if I accept it and conclude that the state court's reliance upon Judge Knuselman's "proclivities" was "contrary" to Strickland under § 2254(d)(1), this claim still fails because he has failed to show-even under a *de novo* review-that his constitutional rights were violated, *i.e.*, that he suffered prejudice as a result of his counsel's alleged ineffective assistance.[16]

Two reasons undergird my decision. First, the evidence that Stevens offers in support of his claim does not establish that, had Dr. Altman and Dr. Landefeld had the information he claims his counsel

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[16] See Aleman v. Sternes, 320 F.3d 687, 690 (7th Cir.2003) (If state court's opinion was "contrary to" Supreme Court law under 28 U.S.C. § 2254(d), that section no longer applies; but, petitioner still must establish an entitlement to the relief he seeks under § 2254(a): that he is "in custody in violation of the Constitution or laws or treaties of the United States."), cert. denied,539 U.S. 960, 123 S.Ct. 2653, 156 L.Ed.2d 659 (2003); Gibbs v. VanNatta, 329 F.3d 582, 584 (7th Cir.2003) (the petitioner "is not entitled to relief in the federal courts unless he can show that he was in fact denied effective assistance of counsel, not merely that the state courts bobbled the issue.")

failed to develop, they would have been able to offer any admissible evidence during the guilt phase on the defense of diminished capacity. Second, there was overwhelming evidence of specific intent to kill; such that Stevens has failed to show that there is a reasonable probability that the outcome of his proceeding would have been different. See Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

Dr. Altman testified at the PCRA hearing that if he would have had all the information at issue here when he was evaluating Stevens prior to trial, he would have directed that the defense secure "more data to clarify" if Stevens was psychotic and/or suffered from organic brain damage. (Dkt. 16, App. 24 at 36-37). To gather that data, Dr. Altman explained that he would have insisted that Stevens receive a neuropsychological battery of tests, as opposed to just the general psychological screening tests that Dr. Landefeld conducted. [17](*Id.* at 36-37, 41-45, 58, 61-63, 74-75, 88).

Following that lead, at the PCRA hearing Stevens presented the testimony of Dr. Carol Armstrong, who conducted the full neuropsychological testing battery that Dr. Altman testified Stevens should have received prior to his trial. Dr. Armstrong testified that the results of her testing established that Stevens had dysfunction of the right frontal area of his brain, had

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[17] Dr. Landefeld testified that he performed a psychological screening, as opposed to recommending that a neuropsychologist conduct a battery of tests, because at the time he had no evidence that would have indicated the presence of a possible neurological problem. (Dkt. 16, App. 17 at 9).

severe psychologic impairment, psychosis, and was under a tremendous amount of emotional distress at the time of the murders. (Id., App. 20 at 12-16; 36, 45).

Dr. Altman explained that the results of Dr. Armstrong's testing established that Stevens had organic brain damage. (Id., App. 24 at 90). Based upon his review of the results of Dr. Armstrong's tests and her report, the journal, and the affidavits of Stevens' daughter and sisters, Dr. Altman testified that he would have been able to provide the following testimony at the sentencing hearing to support the following mitigating factors: that Stevens suffered from delayed development as a child, had sustained head injuries, grew up in a dysfunctional family, suffered from duress at the time of the murders, had a genetic tendency towards alcoholism, was under the influence of extreme mental and emotional disturbance at the time of the murders, and that his capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the offenses. (Id. at 96-97).

Thus, while Dr. Altman's revised diagnosis of Stevens would have been relevant for the purpose of establishing mitigating factors during the sentencing phase of the trial, Stevens has failed to show that it would have been relevant and admissible during the guilt phase. The Third Circuit has noted that: "Pennsylvania case law established that [at the time of Stevens' trial], to prove diminished capacity, only expert testimony on how the mental disorder affected the cognitive functions necessary to form the specific intent [to kill] is relevant and admissible." Zettlemoyer, 923 F.2d at 295 (citing Commonwealth v. Terry, 513 Pa. 381, 521 A.2d 398, 404 (1987); Davis, 479 A.2d at 1080). "Evidence that the defendant lacked the ability to control his actions or that he acted impulsively will

not establish diminished capacity." Stevens II, 739 A.2d at 515 (citing Commonwealth v. Travaglia, 541 Pa. 108, 661 A.2d 352, 359 (1995)). Importantly, Dr. Altman never stated (and in fact was never asked by Stevens' PCRA counsel) that, after considering the information at issue, he would have been able to testify at the guilt phase that Stevens' impairments affected his ability to formulate the specific intent to kill.[18] Compare

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[18] At the PCRA hearing, Dr. Martone testified that if she would have been provided with the journal and the collateral information provided by Stevens' family members, she would have diagnosed Stevens as having been psychotic at the time of the murders. (Dkt. 16, App. 22 at 41-42). She also testified that if counsel had retained her for the purpose of the guilt phase of the trial she would have been able to provide testimony relevant to a diminished capacity defense because, in her opinion "when someone is that psychotic they lack the mens rea to form the intent." (Id.) Stevens relies heavily on her testimony, and indeed so did the state courts. That reliance is misplaced. She was working for the Commonwealth when she made her first diagnosis of Stevens in August 1992, and she was not retained by the defense until after the conclusion of the guilt phase of the trial.

Attorney Lipecky retained Dr. Altman for the purpose of developing guilt-phase mental health defenses. (See e.g., dkt. no. 16, App. 23 at 108). He thus secured for Stevens the expert assistance to which he was entitled for the guilt phase, see Ake v. Oklahoma, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and Stevens does not fault him in that regard. The issue here, then, is what would Dr. Altman, with the benefit of the new information he reviewed for the PCRA proceedings, have testified to

Commonwealth v. McCullum, 558 Pa. 590, 738 A.2d 1007, 1010 (1999) (expert witness made no mention of appellant's cognitive functions of deliberation and premeditation at the time of the murder or his ability-or inability-to formulate the specific intent to kill; testimony would not have been admissible at trial to support diminished capacity defense); Commonwealth v. Blystone, 555 Pa. 565, 725 A.2d 1197, 1207 (1999) (since neither of the experts "testified that [Blystone's] alleged impaired cognitive functions in any way affected his ability to formulate the specific intent to kill[,]" "their testimony was irrelevant with regard to a diminished capacity defense during the guilt phase [.]"); with Commonwealth v. Legg, 551 Pa. 437, 711 A.2d 430, 433 (1998) (the petitioner's expert testified that due to her depression and anxiety, she lacked the ability to rationally formulate the intent to kill; noting that expert's "testimony spoke to more than an inability of [petitioner] to control herself, *and directly related [her] underlying mental defect to her inability to formulate a specific intent to kill.*")

In any event, the evidence of specific intent to kill that the Commonwealth presented at the guilt phase of the trial was so strong that Stevens has not satisfied his burden of establishing that there is a

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during the guilt trial if counsel had not provided the alleged ineffective assistance? Stevens failed to develop testimony from Dr. Altman that he would have been able to testify that, in his expert opinion, Stevens lacked the ability to form the specific intent to kill. (See dkt. 16, App. 24 at 22-24). Under Strickland, it is the petitioner, and no one else, who has the burden to prove all facts in support of his claim. Stevens has not met that burden.

reasonable probability that the outcome of the guilt phase of his trial would have been different if counsel had done all of the things for which he now faults him. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. The Zettlemoyer court noted that, under Pennsylvania law, "[e]vidence of specific intent to kill may disprove the defense of diminished capacity." 923 F.2d at 295-96 (citing Commonwealth v. Tempest, 496 Pa. 436, 437 A.2d 952, 955 (1981)). Accordingly, it determined that even if the petitioner in that case had established that his counsel was constitutionally deficient for failing to develop evidence to support a diminished capacity defense, his claim of ineffective assistance still failed because of the "overwhelming evidence demonstrating [his] specific intent to kill[.]" Id. at 297. That same reasoning applies here.

Stevens admitted during the guilt phase of his trial that he left Armando's bar the night of the murders, retrieved his gun from his car, cocked it three times, and then reentered the bar.[19] (Dkt. 13, App. 2 at 343, 365, 530-31). He stood near the dance floor and waited for Love and his wife to finish dancing. (Id. at 343, 365). When they walked away from each other, he approached his wife, pressed the gun to the back of her head and shot her. (Id. at 227-28, 366). He then turned to Love-who had raised his arms in the air-and shot him twice in rapid succession. (Id. at 551). He shot Love several more times while Love lay on the floor, including an intentional shot to his scrotum area. (Id.

[19] In order to fire his gun, it had to be cocked, which Stevens did. (Id. at 444). The type of bullet he used was a hollow-pointed bullet, which, upon impact, expands and explodes, and is used to inflict serious injury. (Id. at 446-47).

at 377, 557-59, 561). After shooting Love, he then refocused on his wife, who lay lifeless on the floor. He shot her again in the head and he admitted that he had intentionally aimed at her back. [20] (Id. at 559).

Considering all of this evidence, I conclude that-regardless of whether the defense would have proceeded before the judge or opted to have the case tried before a jury-the outcome of Stevens' guilt phase would have been the same: guilty on two counts of first-degree murder. See Zettlemoyer, 923 F.2d at 297-98. Accordingly, Stevens has failed to show that there is a reasonable probability that, even if counsel's conduct was deficient, the result of his guilt proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052.

Moreover, because Stevens has not made a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), I will also deny him a certificate of appealability on this claim.[21]

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[20]Under Pennsylvania law, "[d]ischarging a deadly weapon aimed at a vital part of the body demonstrates specific intent to kill." Zettlemoyer, 923 F.2d at 297 (citing Commonwealth v. Davis, 479 A.2d at 1080).

[21]In order to make a "substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), Stevens must "demonstrat[e] that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 327, 123 S.Ct. 1029.

CONCLUSION

Since 1993, Andre Stevens has challenged his convictions and death sentences on appeal and in state post-conviction proceedings. Today, I confirm the reliability of his convictions, but vacate his death sentences. Stevens was sentenced before a jury that was improperly death qualified. For these reasons, his death sentences cannot stand.

Within 180 days of the entry of my Order in this case, the Commonwealth may conduct a new hearing on whether Stevens should be sentenced to death for the first-degree murders of Brenda Jo Stevens and Michael Love. If the Commonwealth chooses not to conduct such a hearing, it shall sentence him to life in prison in accordance with the laws of the Commonwealth.
An appropriate Order follows.

ORDER

AND NOW this 26th day of May 2004, upon consideration of The Petition for Writ of Habeas Corpus and the complete record in this case, it is hereby ORDERED and DIRECTED that:

1. To the extent that Petitioner seeks relief from his convictions for first-degree murder, his petition for habeas corpus relief is DENIED;

2. To the extent that Petitioner seeks relief from his sentences of death, his petition for habeas corpus relief is GRANTED;

3. The execution of the writ of habeas corpus is STAYED for 180 days from

the date of this Order, during which time the Commonwealth of Pennsylvania may conduct a new sentencing hearing;

4. After 180 days, should the Commonwealth of Pennsylvania not conduct a new sentencing hearing, the writ shall issue and the Commonwealth shall sentence Petitioner to life imprisonment;

5. In accordance with 28 U.S.C. § 2253(c)(2) and W.D. Pa. Local R. 9.4(L), a certificate of appealability is DENIED on Petitioner's guilt-phase claim;

6. If either party files an appeal to the United States Court of Appeals for the Third Circuit, this Order will be stayed pursuant to W.D. Pa. Local R. 9.4(L);

7. The Clerk of Court shall mark this CASE CLOSED.

BY THE COURT:

/S/ ARTHUR J. SCHWAB
ARTHUR J. SCHWAB
United States District Judge

APPENDIX C

[J-267-98]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	:
Appellee	: No. 0229 Capital Appeal Docket
v.	:
ANDRE STEVENS, Apellant	: Appeal from the Order of The Court of Common Pleas of Beaver County dated April 29, 1998 at No. 365A of 1992, denying relief under the Post Conviction Relief Act

SUBMITTED: December 29, 1998

OPINION

NEWMAN, Justice.

Andre Stevens (Appellant) appeals from the denial of his first petition pursuant to the Post Conviction Relief Act (PCRA).[1] We affirm.

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[1] 42 Pa.C.S. §§ 9541-9546.

I. FACTUAL AND PROCEDURAL HISTORY

On direct review of Appellant's two murder convictions, this Court summarized the relevant facts as follows:

> [t]he record reveals that on February 8, 1992, Appellant was in Armando's Bar seated at the end of the bar closest to the entrance. At approximately 1:00 a.m., Brenda Jo Stevens, Appellant's estranged wife, entered the establishment with friends, walked past Appellant and took a seat near the opposite end of the bar. Shortly thereafter, Stevens and [Michael] Love, an acquaintance whom she had met a few months earlier, entered the crowded dance floor and began dancing.
>
> When he saw them dancing together, Appellant left the bar and went to his car, which was parked across the street. There he retrieved a nine-millimeter semi-automatic pistol loaded with hollow point bullets. Appellant then returned to Armando's and made his way across the dance floor, cocking his gun as he proceeded. As Stevens and Love were leaving the dance floor in different directions, Appellant opened fire on them. He shot his estranged wife twice in the head. Appellant then turned toward Love and fired a series of shots into his body. After a brief pause, Appellant fired a final shot into Love's scrotum area and then calmly left the bar. Love remained in a state of consciousness while first aid was

> administered to him. However, he later died as a result of the multiple gunshot wounds.

Commonwealth v. Stevens, 543 Pa. 204, 208, 670 A.2d 623, 625, cert. denied, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

At the guilt phase of his trial, Appellant waived his right to a jury trial and was convicted of two counts of first-degree murder on April 21, 1993. For the penalty phase, Appellant requested a jury, which sentenced him to death on both murder counts. On direct review, we affirmed Appellant's death sentences. Commonwealth v. Stevens, 543 Pa. 204, 670 A.2d 623 (1996). On November 6, 1996, Appellant filed a *pro se* PCRA petition. The PCRA court appointed counsel and Appellant filed an amended PCRA petition on March 10, 1997, raising numerous issues. The trial court held hearings on Appellant's petition, limited to two issues: first, whether trial counsel should have conducted additional investigation on mental health issues; second, whether the proportionality review conducted by this Court violated Appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. On April 29, 1998, the trial court denied Appellant's petition. This appeal followed.

II. DISCUSSION

A. Trial Counsel's Failure to Develop Mental Health Defense/Mitigation

From January 26, 1998 until January 29, 1998, the PCRA court conducted hearings on Appellant's claim that trial counsel was ineffective for failing to provide Appellant's mental health experts with documentation relative to Appellant's mental stability at the time of the murders. According to Appellant, this

information would have allowed him to present expert testimony to make obvious that he was unable, due to his mental illness, to conform his conduct to the requirements of the law. Appellant also asserts that trial counsel was ineffective, therefore, for: (1) failing to present a diminished capacity defense that would have been available had this information been provided to his mental health experts at the time of his trial; (2) failing to present expert testimony that would have established a "diminished mental capacity", which would demonstrate a mitigating circumstance pursuant to Section 9711(e)(3);[2] and (3) failing to present expert testimony that would have established mitigating circumstances pursuant to the "catch-all" mitigating factor found at Section 9711(e)(8).[3] Appellant also

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[2] This section provides:

(e) Mitigating circumstances-Mitigating circumstances shall include the following:

> (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

42 Pa.C.S. § 9711(e)(3).

[3] This section provides:

(e) Mitigating circumstances.-Mitigating circumstances shall include the following:

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense.

maintains that, to the extent that trial counsel pursued mental-illness mitigation evidence, he did so ineffectively by failing to develop more detailed expert testimony concerning the nature and extent of Appellant's mental illness. Appellant maintains that he is entitled to a new trial or, alternatively, a new sentencing hearing due to the alleged ineffectiveness of trial counsel.

When a petitioner alleges trial counsel's ineffectiveness in a PCRA petition, he must prove by a preponderance of the evidence that his conviction or sentence resulted from ineffective assistance of counsel "which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). We have interpreted this provision in the PCRA to mean that the petitioner must show: (1) that his claim of counsel's ineffectiveness has merit; (2) that counsel had no reasonable strategic basis for his action or inaction; and (3) that the error of counsel prejudiced the petitioner-i.e., that there is a reasonable probability that, but for the error of counsel, the outcome of the proceeding would have been different. See Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326, 333 (1999). We presume that counsel is effective, and it is the burden of Appellant to show otherwise.

The documents and information that form the bases of these ineffective claims concern the mental illness of the Appellant at the time of the murders. First, Appellant points to twenty-two pages of handwritten notes taken from his residence during the

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42 Pa.C.S. § 9711(e)(8).

execution of a search warrant at the time of his arrest. They can be loosely described as a journal, and were probably written during a period of time before the murders. In his testimony at the PCRA hearing, Dr. Rodney Steven Altman, a board-certified psychiatrist who assisted in the presentation of Appellant's mitigation case, described these notes as "fragmented," "scattered," "disorganized," "rambling," "confused," and "psychotic." Dr. Altman testified that the notes contained symbolism that was indicative of schizophrenic illness, and that the sequence of words and phrases was "perseverative,"[4] which Dr. Altman explained as "where the speech or thought process is stuck in a certain topic or certain word or certain phrase or certain rhyming quality." As an example of the perseverative quality of Appellant's journal, Dr. Altman noted the unrelated grouping of the words "Bill Cosby, Bill Cousins, Bob Babich, Conrail, Bert," in this repetitive, rhyme-type of cadence. Dr. Altman testified that trial counsel did not give him this journal at the time he evaluated Appellant.[5]

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[4] Perseveration: continuation of something (as an activity or pursuit) usually to an exceptional degree or beyond a desired point: as **a:** continual repetition of a mental act usually evidenced by speech or by some other form of overt behavior especially as a mechanism of defense **b:** a spontaneous and persistent recurrence of something (as an idea, mental image, tune or word).

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged).

[5] A cover letter dated April 5, 1993 from Wayne Lipecky, Appellant's trial counsel, to Dr. Ralph E. Landefeld, a psychologist retained by Dr. Altman to assist in the evaluation of Appellant, was admitted into evidence

The next source of information that Appellant contends his trial counsel was ineffective for failing to produce to his mental health experts at the time they evaluated Appellant prior to, and during trial, concerns aspects of Appellant's social and medical history. At the PCRA hearing, Appellant presented the testimony of his older sister, Rosemary Postich, who described two instances where Appellant suffered head injuries as a young child.[6] Ms. Postich explained that Appellant did not walk or talk until rather late in his childhood and that he was a loner. She testified that their father was an alcoholic, and that their mother was a "dramatic" person who, in the children's presence, would threaten to kill herself or to leave the family. Ms. Postich stated that although Appellant's counsel interviewed her for approximately half an hour and she testified at Appellant's trial, counsel never questioned her about Appellant's childhood. Also at the PCRA hearing, Appellant presented the testimony from another older sister, Constance Corbitt, who corroborated much of Ms. Postich's testimony about their childhood family situation, and who also described the changes in Appellant's behavior that occurred during the periods

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at the PCRA hearing along with the journal. The cover letter requested that Dr. Landefeld review the journal "to see if you can perhaps make something of it." Dr. Landefeld testified that he had no recollection of having received the cover memo or the 22-page journal. Mr. Lipecky testified that he hand-delivered these materials to Dr. Landefeld's office, but not to Dr. Landefeld personally, on the date of the cover letter.

[6] Appellant did not receive medical treatment for these injuries.

of Appellant's separation from Brenda Jo Stevens, including his heavy drinking, substantial weight loss, and overall depression. Ms. Corbitt further testified that she was never contacted by Appellant's counsel and was not called to testify during the trial, although she was present for some of it. Appellant also presented testimony from his daughter, Karen Mangieri (formerly Karen Stevens), who had testified at the sentencing phase of Appellant's trial. She testified at the PCRA hearing that she had informed counsel of various episodes that indicated Appellant's mental illness, including paranoid suspicions about Brenda Jo Stevens using illegal drugs and abusing their grandchild.[7] Ms. Mangieri testified that counsel did not question her about these episodes during Appellant's trial.

The final source of information that Appellant contends his trial counsel was ineffective for failing to produce to his mental health experts are the complete records of psychiatric evaluations conducted while Appellant was in the military in the 1960s. These records indicated that Appellant had been discharged from the service due to his psychological problems, and documented a specific episode where Appellant punched a waitress. Dr. Altman testified that counsel gave him some of Appellant's military records at the time of his initial evaluation, but he had never seen the "majority" of the records introduced at the PCRA hearing.

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[7] There was no evidence that Brenda Jo had ever abused their grandchild or had ever used drugs illegally.

1. Guilt Phase Ineffectiveness

Appellant asserts that trial counsel's failure to produce the journal, and failure to provide the mental health experts with more information concerning his social history and past record of mental illness, denied him the ability to present a defense of Guilty But Mentally Ill or, alternatively, a diminished capacity defense, which otherwise would have been available. To support this claim, Appellant presented Dr. Christine Martone, a board-certified psychiatrist who had testified at the penalty phase of Appellant's trial. Dr. Martone had initially examined Appellant in August of 1992 pursuant to the Commonwealth's request to decide whether Appellant would qualify for an insanity defense. Based on that initial interview, Dr. Martone prepared a report in which she diagnosed Appellant as suffering from an adjustment disorder and a personality disorder but concluded that Appellant did not qualify for an insanity defense and did not suffer from a psychotic disorder. After the guilt phase of Appellant's trial was concluded, Appellant's counsel retained Dr. Martone to assist in Appellant's mitigation case. Accordingly, Dr. Martone again examined Appellant in April of 1993, while the penalty phase was ongoing, and subsequently testified to the nature of Appellant's mental illness. During the PCRA hearings, however, Dr. Martone testified that she was not, at the time of her second evaluation of Appellant, provided with Appellant's journal or the other information concerning Appellant's social history. Had those materials been available to Dr. Martone, they would have affected her earlier diagnoses. According to her testimony at the PCRA hearing, Dr. Martone would have testified at his trial that Appellant would have met the criteria for Guilty But Mentally Ill and that he suffered from a psychosis at the time of the murders.

The trial court denied Appellant's request for a new trial. The court held that the Guilty But Mentally Ill defense is not available in the guilt stage of a capital case, and that there was insufficient testimony to support a diminished capacity defense. We agree. "Guilty But Mentally Ill" is a statutory defense defined at Section 314 of the Criminal Code, and it provides:

> A person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found "guilty but mentally ill" at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of the offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

18 Pa.C.S. § 314(a). The statute further defines "mentally ill" as "[o]ne who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." 18 Pa.C.S. § 314(c)(1). The "Guilty But Mentally Ill" defense, however, is available in capital cases only in the sentencing phase, and not in the guilt phase. Commonwealth v. Faulkner, 528 Pa. 57, 72, 595 A.2d 28, 36 (1991), cert. denied, 503 U.S. 989, 112 S.Ct. 1680, 118 L.Ed.2d 397 (1992). We explained the rationale for this rule in Commonwealth v. Young, 524 Pa. 373, 572 A.2d 1217 (1990):

> In the usual [noncapital] situation the judge is entrusted with determining the appropriate sentence, and the jury's function is confined to determining the guilt of the accused. The verdict providing

> for "guilty but mentally ill" represents an exception to this general rule. By rendering judgment, the jury is permitted to advise the sentencing judge to consider the fact of mental illness in the exercise of his sentencing decision. Capital cases are unique in that the jury and not the judge sets the penalty in such cases. The consideration of a possible verdict of guilty but mentally ill is a matter that would appropriately be rendered by a jury in a capital case during the sentencing phase as opposed to the guilty [sic] phase. We permit the jury to rule upon this penological concern during the guilty phase in all other cases simply because they have no opportunity for input in the sentencing phase. That consideration is not present in capital cases.

Id. at 393, 572 A.2d at 1227. While "Guilty But Mentally Ill" is not available at the guilt phase of a capital case, the capital sentencing statute permits the introduction of a defendant's history of mental illness as mitigating circumstances in the sentencing phase. We have noted that two sections of the capital sentencing statute allow the jury specifically to consider the defendant's mental health in deciding whether to impose the death penalty: Section 9711(e)(2) (that the defendant was under extreme mental or emotional disturbance), and Section 9711(e)(3) (that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired). See Faulkner, 528 Pa. at 73 n. 7, 595 A.2d at 37 n. 7. Accordingly, the trial court correctly held that any testimony by Dr. Martone relating to the "Guilty But

Mentally Ill" statute would have had no application in the guilt phase, and correctly held that the assertion of trial counsel's ineffectiveness in this regard had no merit.

The trial court also determined that counsel was not ineffective for failing to pursue a "diminished capacity" defense that Appellant claimed would have been available had the aforementioned materials concerning Appellant's social history and past mental health problems been provided to his mental health experts. Appellant based this claim primarily on the following testimony from Dr. Martone at the PCRA hearing:

> Q: This information, had it been provided to you earlier in time than now, that would have affected the conclusions in your first report···?
>
> A: Yes. In terms of the diagnosis I would have diagnosed him as Major Depressive Disorder Psychotic, rule [sic] out Paranoid Disorder or Delusional Disorder Paranoid Type, and I would have considered a guilty but mentally ill verdict-recommendation-then.
>
> Q: Would it have any effect on Mr. Stevens' capacity in terms of diminished capacity?
>
> A: In my opinion a psychotic, this is a question for the jury. I mean, I don't make-but in my opinion when someone is that psychotic they lack the mens rea to form the intent.

Notes of Testimony, 1/28/98, pp. 41-42. The trial court concluded that although this testimony "arguably" may have supported a diminished capacity defense, trial counsel was nevertheless not ineffective for failing to pursue it because, as the trier of fact, the court would not have accepted Appellant's defense in light of the other evidence that established Appellant's premeditation.

> We have described "diminished capacity" as a defense that:
>
> "concedes general criminal liability. The thrust of this doctrine is to challenge the capacity of the actor to possess a particular state of mind required by the legislature for the commission of a certain degree of the crime charged." Thus, in a first-degree murder in which the defendant offers the defense of diminished capacity, he is attempting to prove that he was incapable of forming the specific intent to kill, a requirement of first degree murder.

Faulkner, 528 Pa. at 71 n. 4, 595 A.2d at 35 n. 4 (quoting Commonwealth v. Walzack, 468 Pa. 210, 220-21, 360 A.2d 914, 919-20 (1976)). We have held that diminished capacity is "an extremely limited defense." Commonwealth v. Legg, 551 Pa. 437, 711 A.2d 430, 433 (1998). Evidence that the defendant lacked the ability to control his actions or that he acted impulsively will not establish diminished capacity. Commonwealth v. Travaglia, 541 Pa. 108, 124, 661 A.2d 352, 359 (1995), cert. denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

The PCRA court accepted Dr. Martone's testimony at the hearing that she would have testified in support of a diminished capacity defense had (1) Appellant's counsel provided her with the journal and other information regarding Appellant's social history and past mental health problems at the time she examined him for trial, and (2) Appellant retained her for that purpose at the guilt phase of his trial. When questioned regarding his strategy for not pursuing a diminished capacity defense, trial counsel stated that he did not pursue this strategy because, based on Dr. Martone's initial diagnosis that Appellant was not psychotic and not eligible for an insanity-based defense, it did not appear to possess any merit. Appellant argues that reliance on Dr. Martone's initial pretrial examination cannot constitute a reasonable strategic basis for failing to pursue a diminished capacity defense because of counsel's underlying ineffectiveness in failing to obtain a more favorable diagnosis based on the other information of Appellant's social history and past mental health problems allegedly available to Appellant's counsel.

Whether this decision constituted a reasonable strategic decision as we have defined that standard within the test for ineffective assistance of counsel, however, is a determination we need not make if the Appellant cannot show prejudice by counsel's alleged failures. See Commonwealth v. Pirela, 556 Pa. 32, 726 A.2d 1026 (1999). Here, the trial court, as the factfinder in Appellant's nonjury trial, concluded that, notwithstanding Dr. Martone's change of diagnosis, it would still have concluded that Appellant had the capacity to form the specific intent to kill at the time of the murders. At Appellant's trial, there was testimony that, on the evening of the murders, Appellant became very angry when he saw Brenda Jo dancing with Love.

Appellant slammed his forearms on the bar and stood and stared at Love and Brenda Jo and then left the bar. He retrieved his gun from beneath the seat of his vehicle and returned to the bar. Appellant walked toward the table area, pulled the gun from underneath his jacket, raised it, but then lowered it to his side and waited until Love and Brenda Jo were finished dancing. When they left the dance floor, Appellant cocked the gun and without hesitation walked up behind Brenda Jo and shot her in the back of the head at close range. He then turned to Love and shot him twice rapidly in succession, and fired at Love several times while he lay on the floor, including an intentional shot through the scrotum area. Appellant fired a last shot at Brenda Jo, hitting her again in the head. Appellant had fired a total of ten shots. Based on this evidence of Appellant's deliberate actions in leaving the bar and returning to shoot his wife and Love multiple times, the trial court concluded that Appellant had formed the specific intent to kill. Notwithstanding Dr. Martone's revised diagnosis of Appellant's psychosis from the trial to the PCRA hearings, the trial court found through circumstantial proof that the Commonwealth had established beyond a reasonable doubt that Appellant had the specific intent to kill, and therefore determined that Appellant suffered no prejudice by pursuit of a defense that would have been unsuccessful had Appellant's counsel presented it. We agree with the finding of the trial court that Appellant has not proved, by a preponderance of the evidence, that there was a reasonable probability that presentation of expert testimony concerning Appellant's psychosis would have successfully prevented the Commonwealth from proving Appellant's premeditation beyond a reasonable doubt.

2. Penalty Phase Ineffectiveness

Appellant's counsel presented testimony from Dr. Altman, Dr. Landefeld, and Dr. Martone concerning Appellant's mental illness as part of his case in mitigation at the sentencing phase. The jury accepted this evidence, and found the Section 9711(e)(2) mitigator-that Appellant had been "under the influence of extreme mental of emotional disturbance." 42 Pa.C.S. § 9711(e)(2).[8] At the PCRA hearing, Appellant argued that his counsel's alleged failure to provide his experts with available information regarding his social history and earlier mental health problems deprived him of more favorable expert testimony that would have established mitigating circumstances pursuant to Sections 9711(e)(3) and 9711(e)(8). Appellant asserts that there is a reasonable probability that, had counsel adequately prepared the experts and presented this additional mental health testimony, the jury would have found in favor of a life sentence, and therefore Appellant is entitled to a new sentencing hearing.

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[8]The trial court instructed the jury on three mitigating circumstances: that the defendant had no significant history of prior criminal convictions (42 Pa.C.S. § 9711(e)(1)); that the defendant was under the influence of extreme mental or emotional disturbance (42 Pa.C.S. § 9711(e)(2)); and the catch-all mitigating factor (42 Pa.C.S. § 9711(e)(8)). In addition to finding that Appellant was acting under the influence of extreme mental or emotional disturbance, the jury also found that Appellant had no significant history of prior criminal convictions.

At the PCRA hearing, Dr. Altman testified that when he evaluated Appellant in 1993, trial counsel had given him only a portion of Appellant's military records and the records of Appellant's commitment at the Community Mental Health Center of Beaver County in 1971. Dr. Altman examined Appellant on March 29, 1993 and April 15, 1993, and prepared a report based on those examinations, his review of the records provided by trial counsel, and a report by Dr. Landefeld of the results of the psychological tests conducted by Dr. Landefeld.[9] In his report, Dr. Altman concluded that Appellant suffered from "a relatively severe personality disorder consisting of paranoia, mood fluctuations, difficulties in judgment as well as rationalized disregard and retribution for and against others." During the sentencing phase of Appellant's trial, Dr. Altman testified to the diagnosis contained in his report, and was questioned about the similarities between Appellant's mental illness as reflected in his military reports and his mental health at the time of the murders. At the PCRA hearing, Dr. Altman testified that, based on the information provided to him in connection with the PCRA proceedings, he believed to a reasonable degree of medical certainty that Appellant's ability to conform his conduct to the requirements of law was substantially impaired at the time of the offense.

At the sentencing phase of Appellant's trial, counsel called Dr. Landefeld to testify about the

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[9]At the PCRA hearing, Dr. Altman stated that when he prepared his April 15, 1993 report, he did not have a written report from Dr. Landefeld, but instead he and Dr. Landefeld had a telephone conversation about the results of Appellant's psychological tests.

psychological testing of Appellant conducted at Dr. Altman's request. Counsel asked Dr. Landefeld to describe the tests that he administered, and Dr. Landefeld testified that he evaluated Appellant on April 6, 1993 and April 9, 1993, and that he gave Appellant four tests: the Benton Visual Retention Test, a Trail-Making Test, a Rorschach Test, and the Minnesota Multiphasic Personality Inventory. Dr. Landefeld explained that these tests were given as part of a neuropsychological screening inventory to see whether there could be some neurological component to Appellant's mental illness. Appellant's counsel did not question Dr. Landefeld extensively about the results of those tests, and limited his questioning to establishing that Dr. Landefeld reported the results of those tests to Dr. Altman. On cross-examination by the Commonwealth, however, Dr. Landefeld testified that the neuropsychological screening inventory of Appellant gave no "indication of ··· any central nervous system problem." N.T. 4/29/93, p. 9.

In connection with the PCRA proceedings, Appellant was examined by Dr. Carol Armstrong, a neuropsychologist who conducted a neuropsychological testing battery. Dr. Armstrong testified that she administered the neuropsychological testing battery so that she could contribute to Appellant's neurological diagnosis and describe any functional impairments. She explained that neurological screening such as that conducted by Dr. Landefeld was "not very accurate" and that it had the "possibility of missing brain dysfunction if it's in a certain specific region." N.T. 1/27/98, p. 20. She explained that neurological screening should be used to determine whether full neuropsychological testing should be done, and it was inadequate for assessing neurological impairment. The full neuropsychological battery conducted by Dr.

Armstrong suggested that Appellant had "right hemisphere brain dysfunction" and that this would influence his ability to control his mood, emotions, and impulsive responses. According to Dr. Armstrong, if the information regarding Appellant's childhood head injuries, his complete military psychiatric records, Appellant's journal, and additional collateral source information about Appellant's social history had been provided to Dr. Landefeld, then it should have indicated to Dr. Landefeld that a full neuropsychological battery of tests was necessary to determine whether Appellant suffered from any "organic" brain dysfunction. On cross-examination, however, when asked whether it would be reasonable for a general-practitioner psychologist such as Dr. Landefeld to rely on a neuropsychological screening test in his examination of Appellant, Dr. Armstrong responded that " psychologists, clinical psychologists are taught to do that and it's a standard part of their training···." N.T., 1/27/98, p. 81.

At the PCRA hearing, Appellant's PCRA counsel extensively questioned Appellant's trial counsel, Wayne Lipecky,[10] with regard to the strategic basis for his manner of presenting the mental health expert testimony of Dr. Landefeld, Dr. Altman, and Dr. Martone. Lipecky testified that his overall strategy was to keep the mental health testimony consistent and to relate it to Appellant's previous psychological problems as documented in his military psychiatric records and his 1971 commitment to show that Appellant suffered from a lifelong mental illness that had not been properly treated. Lipecky stated that he consulted with

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[10] Mr. Lipecky was also Appellant's counsel for his direct appeal.

Dr. Altman at first in order to determine whether an insanity-based defense would be available to Appellant at the guilt phase of the trial, but abandoned that strategy when Dr. Altman's diagnosis that Appellant did not qualify for an insanity-based defense accorded with Dr. Martone's earlier diagnosis. He also retained Dr. Altman to develop mitigation evidence. Lipecky testified that he met with Dr. Altman on a Sunday afternoon sometime between Dr. Altman's March 29, 1993 and April 15, 1993 examinations of Appellant and reviewed all of the materials in Appellant's file with Dr. Altman. Contrary to the testimony of Dr. Altman at the PCRA hearing, Lipecky testified that he showed the twenty-two-page journal to Dr. Altman during that Sunday discussion.

Lipecky also testified that he discussed with Dr. Martone in an hour-long telephone conversation the contents of the information he possessed regarding Appellant's delusions concerning his wife's sexual abuse of his daughter and grandchild and his wife's drug use. This conversation took place before her second evaluation of Appellant. Contrary to Dr. Martone's testimony at the PCRA hearing, Lipecky testified that he disclosed all of the relevant background information that he possessed on Appellant's past psychological problems and delusions. He further testified that he relied on the professionalism of the experts for Appellant to diagnose him, and that, at trial, he did not want to develop their diagnoses too specifically so that he would avoid confusing the jury, and cause them to disbelieve the expert testimony. When asked why he did not delve further into the details of his experts' reports or question them regarding each of Appellant's past delusions, Lipecky responded:

A: I would say that if we started to discuss delusions and hallucinations it could lead to a fudging of his testimony that might cause them to think that there was, where he would start talking about a psychosis when he really didn't find a psychosis and a jury wouldn't believe him or any of the other psychiatrists···.

Q: So same thing as to Dr. Martone?

A: I would suppose so, yeah.

Q: Same thing as to Dr. Altman?

A: Correct.

N.T. 4/29/98, p. 130.

We agree with the trial court that Appellant has failed to prove, by a preponderance of the evidence, that the preparation and presentation by trial counsel of the mental health expert testimony was constitutionally ineffective. Appellant relies on the benefit of hindsight and downplays the diagnoses available to his counsel at the time his case was tried. Counsel testified that he provided Dr. Altman, who was his primary mental health expert, with as much information as he had, including substantial information concerning Appellant's social history and prior mental health problems. He relied on Dr. Altman to present the most favorable mental health mitigation case available, and he attempted to present this and the other expert testimony in a manner that would be understandable to, and believed by, the jury. Indeed, Appellant's counsel succeeded insofar as the jury found the

Section 9711(e)(2) mitigator. This is not an instance where counsel failed to present a mental health mitigation case despite the presence of evidence to support such a case. Compare Commonwealth v. Smith, 544 Pa. 219, 675 A.2d 1221 (1996), cert. denied, 519 U.S. 1153, 117 S.Ct. 1090, 137 L.Ed.2d 223 (1997). Rather, this is a case where a more competent evaluation by the professionals retained by Appellant may have resulted in a more thoroughly developed mental health mitigation case. However, our review of the PCRA hearing indicates that such failures, if any occurred, do not rest at the feet of Appellant's counsel, and that the court properly denied Appellant's claim of trial counsel's ineffectiveness.

B. Trial Court's Method of Selecting the Prospective Jurors

During voir dire on Friday, April 23, 1993, it became apparent to the trial court that there would be an insufficient number of jurors to complete the jury selection process. Accordingly, the trial court issued an order pursuant to Rule 1109 of the Pennsylvania Rules of Criminal Procedure directing the Sheriff to summon thirty persons qualified and competent to serve as jurors.[11] The Sheriff complied with the order of the trial

[11] Rule 1109(a) provides:

When a sufficient number of qualified jurors are not present to permit selection of a jury, the court shall:

(a) Require the officials designated by law to summon prospective jurors to summon and return immediately from the county at large as many qualified and competent persons as shall be necessary....

Pa.R.Crim.P. 1109(a).

court by issuing a summons to each of thirty individuals at the Beaver Valley Mall on Saturday, April 24, 1993, which required their appearance at the courthouse on Monday, April 26, 1993. Appellant claims that this manner of selecting the jury pool violated his Sixth, Eighth, and Fourteenth Amendment rights because law enforcement officers effectively prescreened the jury pool outside the presence of Appellant or his counsel, and that he was denied a jury that represented a fair cross-section of the community. Appellant alleges that all previous counsel were ineffective in failing to raise this issue on direct appeal and for failing to create a record on this issue.

Although Appellant states that he was denied a jury that represented a fair cross-section of the community, Appellant has failed to create a record to establish even a prima facie claim. To establish a prima facie violation of the requirement that the jury array fairly represent the community, a defendant must show that: (1) the group allegedly excluded is a distinctive group in the community; (2) the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such people in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. Commonwealth v. Craver, 547 Pa. 17, 28, 688 A.2d 691, 696, cert. denied, 522 U.S. 834, 118 S.Ct. 104, 139 L.Ed.2d 58 (1997) (citing Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579, 586-87 (1979)). Appellant does not allege that the summoning of additional prospective jurors from the Beaver Valley Mall resulted in the systematic exclusion of a distinctive group in the community, and, therefore, he does not allege a prima facie claim of denial of a jury that represented a fair cross-section of the community.

Appellant, however, alleges that prior counsel was ineffective for not arguing that the selection of thirty potential jurors by the deputies of the Sheriff at the Beaver Valley Mall without the participation of Appellant or his counsel violated his rights to due process under the Pennsylvania and United States Constitutions because the selection of the prospective jurors amounted to a "pre-screening" by law enforcement. This claim must fail, as Appellant cannot establish that the method of selecting additional prospective jurors prejudiced him. In Commonwealth v. Albrecht, 510 Pa. 603, 511 A.2d 764 (1986), we rejected a similar claim. We held that selecting twenty-nine prospective jurors from local shopping centers by Sheriff's deputies, pursuant to a court order, did not violate the right of the defendant to a jury comprised of a fair cross-section of the community. Here, as in Albrecht, Appellant had the opportunity to question all of the additional veniremen in the same fashion as he questioned the original veniremen to see if they were competent, fair, impartial, and unprejudiced. Indeed, Appellant did not exhaust his peremptory challenges during the jury selection process. A review of the voir dire shows that the potential jurors were from different locations in Beaver County and were of different ages and genders. Considering the thorough examination of the prospective jurors during voir dire and the failure of Appellant to allege the selection process systematically excluded any distinctive group, we conclude that the court properly denied Appellant relief on this issue.

C. Death/Life Qualified Jurors

Appellant's third claim of prior counsel's ineffectiveness concerns the disqualification of jurors during voir dire based on those jurors' opinions about the death penalty. Appellant asserts that counsel was

ineffective for failing to pursue two instances of alleged trial court error in the jury selection process: first, that the trial court granted a challenge for cause where a prospective juror expressed opposition to the death penalty (i.e., that the trial court improperly "death qualified" the jury); second, that the trial court refused to grant Appellant's challenge for cause to a juror who allegedly held a fixed opinion in favor of the imposition of the death penalty (i.e., that the trial court did not properly "life-qualify" the jury).

In support of his claim that the jury panel was improperly "death qualified," Appellant relies on the decision of the trial court to grant the challenge of the Commonwealth for cause of one prospective juror following this exchange:

> THE COURT: As you know you are being considered as a juror in a case involving the deaths by homicide of Brenda Jo Stevens and Michael Love···. The Defendant is Andre Stevens and the Commonwealth has secured a verdict of guilty of murder of the first degree with respect to both of those deaths. It is now up to a jury to determine whether to impose the penalty of death or the penalty of life imprisonment upon Mr. Stevens. Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?
>
> A: I don't believe in the death penalty.

N.T., 4/22/93, p. 161. Trial counsel posed no objection to the decision of the court to strike this juror for

cause. Appellant presently maintains that counsel was ineffective for not rehabilitating this juror by questioning her whether she would be able to follow the instructions of the trial court in deciding what sentence to impose and for not objecting when the trial court removed this potential juror for cause solely because she expressed an opposition to the death penalty.

It is well settled that a prospective juror may be excluded for cause when his or her views on capital punishment are such as would prevent or substantially impair the performance of his or her duties as a juror in accordance with his or her instructions and his or her oath. Commonwealth v. Holland, 518 Pa. 405, 416, 543 A.2d 1068, 1073 (1988). When the prosecutor seeks to remove a juror because that juror expresses views against the death penalty that prevent the juror from following the instructions of the court, we refer to this as "death-qualification." See Commonwealth v. Morris, 546 Pa. 296, 301 n. 2, 684 A.2d 1037, 1040 n. 2 (1996), cert. denied, 521 U.S. 1106, 117 S.Ct. 2484, 138 L.Ed.2d 992 (1997). Appellant argues that trial counsel was ineffective for failing to object to the trial court's striking of this juror for cause where there was insufficient testimony concerning whether she would be able to apply the court's instructions regardless of her anti-death penalty views. We disagree.

The decision whether to disqualify a juror is within the sound discretion of the trial court and will not be reversed in the absence of a palpable abuse of discretion. Commonwealth v. Colson, 507 Pa. 440, 454, 490 A.2d 811, 818 (1985), cert. denied, 476 U.S. 1140, 106 S.Ct. 2245, 90 L.Ed.2d 692 (1986). The trial court makes that determination based on the prospective juror's answers to questions and demeanor. Id. Here, the remainder of the voir dire indicates that the trial

court did not deny counsel the opportunity to question the veniremen or to attempt to rehabilitate the prospective jurors if counsel chose to do so, and specifically directed Appellant's counsel to object if he thought the trial court's granting of the challenge for cause was improper. Our review of the voir dire indicates that with most other jurors, except where the cause for striking the juror was immediately clear, the court inquired as to whether that juror would be able to set aside his or her personal opinion of the death penalty and follow the instructions of the court. We accept the statement of the trial court in its opinion when it stated that its decision not to conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question. Accordingly, we find no merit to Appellant's claim that counsel was ineffective for not objecting to the "death qualification" of the jury.

Appellant also asserts that trial counsel was ineffective for not properly "life qualifying" the jury by failing to object to the refusal of the trial court to strike for cause a juror who expressed support for the death penalty. The purpose of "life qualifying" the jury is to ask questions on voir dire that identify prospective jurors who would be unable to consider a sentence of life imprisonment. Commonwealth v. Morris, 546 Pa. 296, 307, 684 A.2d 1037, 1043 (1996). Because the prosecutor, through his or her "death qualifying" questions, is allowed to determine that a juror is capable of sentencing the defendant to death in appropriate circumstances, due process requires that the defendant also be permitted to question prospective jurors to disqualify those who would be incapable of imposing a life sentence regardless of the instructions of the court. See Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). While the court

cannot deny the defendant the opportunity to life-qualify the jury, there is no requirement that counsel ask life-qualifying questions. Commonwealth v. Lark, 548 Pa. 441, 451, 698 A.2d 43, 48 (1997).

Here, Appellant argues that the refusal of the trial court to grant his challenge for cause of another prospective juror was erroneous, and that counsel was ineffective for not pursuing this on appeal. In response to the question, "Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed," this juror replied, "I believe in the death penalty. But whatever, I would go by the instructions, whatever the Court-." N.T., 4/22/93, p. 63. She also stated that she would be more likely to believe a police witness than a defense witness but that she would set aside that view and follow the court's instructions. Counsel objected to the refusal of the court to strike this juror for cause, and exercised a peremptory challenge. We find Appellant's claim that counsel was ineffective for not pursuing this matter on appeal is without merit. The record amply demonstrates that this juror testified that she could set aside her views concerning the death penalty and the credibility of police witnesses and follow the instructions of the court. Accordingly, the decision of the court to deny the challenge for cause was proper, and we will not find counsel ineffective for failing to pursue a claim that has no merit.

D. *Introduction of Prejudicial Evidence at Penalty Phase*

As his fourth assertion of his prior counsel's ineffectiveness, Appellant claims that counsel was ineffective for failing to object to the introduction at the sentencing proceedings of allegedly prejudicial evidence

concerning the relationships of Appellant with other women during his marriage. During the penalty phase, the Commonwealth elicited testimony from four witnesses who testified that on occasion Appellant had dated other women during the periods of separation from his wife, and that Appellant had been seen dancing with other women. The Commonwealth offered this testimony to rebut Appellant's explanation that he had shot his wife when he witnessed her dancing with Love.

As with all claims of ineffectiveness of counsel, Appellant must show that counsel's alleged failure to raise this issue prejudiced him. We find no prejudice to Appellant with regard to this issue. Contrary to Appellant's assertion, the Commonwealth did not attempt to present to the jury a nonstatutory aggravating factor by arguing the infidelity of Appellant was a reason to impose the death penalty. Instead, the Commonwealth's relatively infrequent introduction of testimony about Appellant's involvement with other women was to counteract any sympathy that Appellant sought to generate through the testimony that he introduced that he shot his wife because he saw her dancing with another man. Because of the Commonwealth's limited use of this testimony, we cannot find that there is a reasonable probability that, had this evidence been excluded, the outcome of the proceedings would have been different. Accordingly, we deny this ineffectiveness claim.

E. Erroneous Jury Instructions

1. Torture

Appellant claims ineffectiveness of counsel for failing to challenge the trial court's instruction

regarding the aggravating factor of torture [12] on grounds that the instruction was unconstitutionally vague and that this Court's limiting construction of that aggravating factor fails to cure the deficiency. The instruction of the trial court regarding torture was as follows:

> Now in proving death committed by means of torture as an aggravating circumstance, the Legislature did not intend to limit means of torture to those used in the Middle Ages or in some horror movies that somebody may have seen such as a rack or boiling in oil. For a person to commit murder by means of torture under this aggravating circumstance he must intend to inflict a considerable amount of pain or suffering and must do so in a manner or by means that are unnecessarily heinous or atrocious or cruel and show exceptional depravity. Implicit in this definition of torture is the concept that the pain or suffering was unnecessary or more than needed to effectuate the death of the victim. The intent to inflict a considerable amount of pain or suffering may be inferred from the circumstances. Neither the efficacy of the means employed by the defendant to murder the victim of the immediacy of death is in itself a determinant, although in the question of whether the offense was committed by means of torture, it does not matter [sic] a

[12] 42 Pa.C.S. § 9711(d)(8).

> victim may not have actually suffered pain due to loss of consciousness, for example, in determining whether the defendant had the intent to inflict a considerable amount of pain. A defendant's ability to achieve a particular result does not negate the possibility that he intended to bring about the result.

N.T., 4/29/93, pp. 65-66.

On direct appeal, we found that there was sufficient evidence to support the jury's finding of the aggravating factor of torture because the number and placement of shots into Love's body, especially the final shot into Love's scrotum, and the fact that Love remained conscious for a long period of time before he died, demonstrated Appellant's intent to inflict considerable pain and suffering. Commonwealth v. Stevens, 543 Pa. 204, 215, 670 A.2d 623, 628 (1996). We stated that in order for the Commonwealth to substantiate the aggravating circumstance of torture beyond a reasonable doubt, it must be demonstrated that Appellant possessed an intent, separate from the intent to kill, to inflict a considerable amount of pain and suffering that was unnecessarily heinous, atrocious, or cruel, manifesting exceptional depravity. Id. at 214, 670 A.2d at 628 (citations omitted). The instruction of the trial court in this case adequately explained what the jury must find in order to apply the aggravating circumstance of torture, and counsel is not ineffective for failing to pursue a meritless challenge to the sufficiency of the trial court's instruction.

Moreover, Appellant's contention that former counsel was ineffective for failing to raise a claim that this Court's construction of the aggravating circumstance of torture is unconstitutionally vague is

without merit. The test promulgated by the United States Supreme Court for determining whether a statutory aggravator is unconstitutionally vague is: (1) whether the statutory language is vague on its face; (2) if vague on its face, have the appellate courts given further definition to the vague term; and (3) is the definition given by the appellate courts constitutionally sufficient. Walton v. Arizona, 497 U.S. 639, 654, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). In Commonwealth v. Nelson, 514 Pa. 262, 278, 523 A.2d 728, 737, cert. denied, 484 U.S. 928, 108 S.Ct. 293, 98 L.Ed.2d 253 (1987), we noted that the test to decide if a statutory aggravator is unconstitutionally vague is "whether the prohibited conduct is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." We held that the term "torture" is generally understood as "the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity." Nelson, 514 Pa. at 279, 523 A.2d at 737, quoting Commonwealth v. Pursell, 508 Pa. 212, 239, 495 A.2d 183, 196 (1985). While we concluded in *Nelson* that "the word 'torture,' even with its ductile quality, does not present a vagueness question of constitutional proportions," we held that further refinement of the term was necessary in order to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance that make the process for imposing a sentence of death rationally reviewable. Nelson, 514 Pa. at 279, 523 A.2d at 737 (citing Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980)). Accordingly, we developed the rule, which is applied here and in all capital cases involving the aggravating factor of torture, that the Commonwealth must show beyond a reasonable doubt that the defendant possessed an intent, separate from

the intent to kill, to inflict a considerable amount of pain or suffering that was unnecessarily heinous, atrocious, or cruel. See, e.g., Commonwealth v. Stevens, 543 Pa. 204, 214, 670 A.2d 623, 628 (1996). This refinement of the definition of the "torture" aggravating circumstance comports with the requirements of *Walton* and is not unconstitutionally vague, and we will not deem counsel ineffective for failing to pursue this issue that has no merit.

2. Grave Risk of Death to Another

The next claim of error concerns the failure of prior counsel to challenge the instruction of the trial court regarding the aggravating circumstance of knowingly creating a grave risk of death to another person in addition to the victim of the offense. See 42 Pa.C.S. § 9711(d)(7). The trial court's instruction on this aggravating factor was as follows:

> First, in the commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense. A person knowingly creates a grave risk of death to another person in addition to the victim of the offense if he's aware that his conduct is of that nature or that such circumstances exist. Therefore, in deliberating on this aggravating circumstance you should consider all of the evidence concerning the defendant's conduct at the time of the shooting and the attendant circumstances including the number of people in the bar at the time of the shooting, their relative location and proximity with reference to the defendant at the time of the shooting, the

> number and direction of shots fired, the danger of ricocheted bullets, whether or not the defendant pointed the gun at another person or persons, evidence of the spent bullets in the bar stool, evidence of a hole in the coat of one of the patrons and whether or not that hole was caused by a bullet and evidence of fragments found and their location in the area of the bar.

N.T. 4/29/93, pp. 63-64.

Appellant asserts that former counsel was ineffective for failing to challenge this statutory factor as unconstitutionally vague and for failing to challenge the trial's court's instruction, which Appellant claims did not narrow the deliberations of the jury in accordance with our previous construction of this aggravating circumstance. The first argument is without foundation, and we have already determined that the Section 9711(d)(7) aggravating factor is not unconstitutionally vague on its face. See Commonwealth v. Smith, 518 Pa. 15, 45, 540 A.2d 246, 261 (1988) (citing Gregg v. Georgia, 428 U.S. 153, 203-04, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976)); Proffitt v. Florida, 428 U.S. 242, 256, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 (1976). We also do not find that the instruction of the trial court failed to limit the consideration of the jury pertaining to what must be proven in order for this aggravating factor to apply. Appellant relies on Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704 (1992), where we found that the trial court improperly instructed the jury, in a triple-murder case, that the risk of death to the other two victims could be considered as evidence of the Section 9711(d)(7) aggravator for the murder of the first victim.

We stated that the "aggravating circumstance at issue applies to situations where the defendant in the course of killing his particular victim acts in a manner which endangers the lives of others close in proximity to the intended or actual victim." *Id.* at 260, 615 A.2d at 713. Here, unlike the defective instruction in *Stokes*, the trial court did not impermissibly refer to the killing of the second victim as grounds for finding this aggravator in the killing of the first victim.[13] As the instruction demonstrates, the trial court properly instructed the jury that they could consider the risk of death to the other patrons of the bar in finding the Section 9711(d)(7) aggravator. Counsel was not ineffective for not pursuing this claim without merit.

3. Double Counting of Same Aggravation Evidence

Appellant avers that former counsel was ineffective for not challenging the instructions of the trial court to the jury on the grounds that the

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[13] Appellant claims that because the trial court, in giving the Section 9711(d)(7) instruction to the jury concerning the murder of Michael Love, referred to the instruction as "the same as the first one in connection with the victim, Brenda Jo Stevens," and did not repeat the instruction, the court may have lead the jury to believe that the murder of Brenda Jo Stevens counted towards this aggravator. We disagree. We believe that the trial court's reference to its earlier, very detailed instruction about what facts and circumstances the jury could consider in finding this aggravator was sufficiently clear and did not mislead the jury into believing that the murder of Brenda Jo Stevens could be considered in finding this aggravator for the murder of Michael Love.

cumulative effect of these instructions was to cause the jury to believe that the same predicate facts could serve as the basis for finding the Section 9711(d)(7) (grave risk of death to another) and Section 9711(d)(11) (conviction of another murder) aggravating factors. We disagree. As discussed above, the instructions of the trial court regarding the Section 9711(d)(7) aggravator were proper and did not mislead the jury to believe that the death of either victim could be considered in establishing this aggravator for the murder of the other victim. Instead, the trial court properly explained to the jury that the murder of one victim could establish the Section 9711(d)(11) aggravating factor for the murder of the other victim when it instructed:

> The second aggravating circumstance with regard to the death of Brenda Jo Stevens is as follows: the defendant has been convicted of another murder committed either before or at the time of the offense at issue. In your deliberations on this aggravating circumstance you should understand that the word convicted as used in that circumstance means found guilty. It does not require that the defendant has also been sentenced. This aggravating circumstance, therefore, includes a double murder and only requires that the defendant has been found guilty of another murder committed either before or at the time of the offense at issue.

N.T., 4/29/93 at pp. 64-65. With respect to the Section 9711(d)(11) aggravator for the murder of Michael Love, the trial court stated that "[t]he second [aggravator] is that the defendant has been convicted of another

murder committed either before or at the time of the offense at issue. And again, I won't give you the supplemental instruction with regard to this aggravated assault [sic] circumstance." N.T., 4/29/93 at p. 65.[14]

The instructions of the trial court did not result in the double counting of the same factual predicate to establish two aggravating circumstances. As discussed above, the trial court's instructions on the Section 9711(d)(7) aggravator directed the jury to the grave risk of death posed by Appellant's firing of a pistol in a bar where other patrons were present and in close proximity, and did not suggest that the murder of the other victim could count towards this aggravator. Further, the instructions of the trial court on the Section 9711(d)(11) aggravator properly informed the jury that the murder of Brenda Jo Stevens could count as an aggravating circumstance in the murder of Michael Love, and vice-versa. We conclude that counsel was not ineffective for failing to raise this issue that has no merit.

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[14] This instruction came after the trial court's instruction on the Section 9711(d)(7) aggravator for the murder of Michael Love, *see* footnote 13, *supra*, where the court referred the jury to the instruction it had given for that aggravator for the murder of Brenda Jo Stevens. While the court did not explicitly refer to the instruction for the double murder aggravator that it gave for the murder of Brenda Jo Stevens, it is clear from the instructions as a whole that the trial court, when instructing the jury on the double murder aggravator for the killing of Michael Love, was referring to that earlier instruction.

4. Reasonable Doubt

Appellant claims that previous counsel was ineffective for not challenging the alleged failure of the trial court to instruct the jury that the Commonwealth must prove each element of each aggravating circumstance beyond a reasonable doubt. Following the conclusion of testimony at the penalty phase, the trial court instructed the jury:

> The Commonwealth must prove any aggravating circumstance beyond a reasonable doubt. This does not mean that the Commonwealth must prove the aggravating circumstance beyond all doubt and to a mathematical certainty. A reasonable doubt is the kind of doubt that would cause a reasonable and sensible person to hesitate before acting upon an important matter in his own affairs. A reasonable doubt must fairly arise out of the evidence that was presented or out of the lack of evidence which was presented with respect to some elements of the aggravating circumstance.

N.T., 4/29/93, pp. 62-63.

This instruction properly informed the jury of the standard for finding reasonable doubt and complied with the Pennsylvania Criminal Suggested Standard Jury Instruction 15.2502F(2). Moreover, the last sentence of this instruction directed the jury that they could have a reasonable doubt if the Commonwealth failed to produce sufficient evidence with respect to "some" elements of the aggravating circumstance. While Appellant contends that this instruction could mislead

the jury into believing that they had to find insufficient evidence for more than one element of an aggravating circumstance in order to have a reasonable doubt, whereas a lack of evidence regarding *one* element of an aggravating circumstance would be sufficient to hold a reasonable doubt, Appellant fails to demonstrate prejudice from the instruction of the trial court. Appellant does not show how the absence of a specific reference to "one" or "any" element of an aggravating circumstance in this instruction caused unreliable death sentences, particularly in light of our conclusion, both on direct review and in this appeal, that there was sufficient evidence to support the aggravating circumstances found by the jury. Without such a demonstration of prejudice, Appellant cannot prevail on a claim of ineffective assistance of counsel. Commonwealth v. Kimball, 555 Pa. 299, 724 A.2d 326 (1999).

5. Mitigating Factors

Appellant claims that previous counsel was ineffective for not challenging the instruction of the trial court concerning the purpose of aggravating and mitigating circumstances in capital cases. Specifically, Appellant complains that the following portion of the instruction of the trial court interfered with the determination of the jury of Appellant's personal moral culpability for these murders: "[t]he Sentencing Code defines aggravating and mitigating circumstances. There [sic] are things that make a first degree murder case either more terrible or less terrible." N.T., 4/29/93, p. 62. According to Appellant, the use of the word "terrible," in conjunction with the use of the word "case," improperly distracted the jury from consideration of Appellant's mitigation evidence by drawing their attention to a generalized conception of the "case."

When reviewing a challenge to a part of a jury instruction, an appellate court must review the jury charge as a whole to determine if it is fair and complete. Commonwealth v. Jones, 542 Pa. 464, 517, 668 A.2d 491, 517 (1995), cert. denied, 519 U.S. 826, 117 S.Ct. 89, 136 L.Ed.2d 45 (1996) (citing Commonwealth v. Saunders, 529 Pa. 140, 602 A.2d 816 (1992)). A trial court has broad discretion in phrasing its charge and can choose its own wording so long as the law is clearly, adequately, and accurately presented to the jury for its consideration. Id. Appellant ignores an earlier instruction by the trial court regarding the function of aggravating and mitigating circumstances, where the court stated:

> Now, the sentence that you impose will depend on whether you find any of the things that the Pennsylvania Sentencing Code calls aggravating or mitigating circumstances. Loosely speaking, aggravating circumstances are things about the killing and the killer which make a first degree murder case more terrible and deserving of the death penalty, while mitigating circumstances are those things which make the case less terrible and less deserving of the death penalty.

N.T., 4/26/93, pp. 4-5. We do not find that the instructions of the trial court, as a whole, interfered with the jury's evaluation of the specific mitigation evidence presented by Appellant or their assessment of his personal moral culpability. These instructions merely expressed to the jury, in laymen's terms, the purpose for the distinction between aggravating and mitigating circumstances in a capital penalty phase. Appellant does not challenge the propriety of the

instructions of the trial court concerning the mitigating circumstances offered by Appellant, and we have found that the instructions of the trial court on the aggravating circumstances were proper. Therefore, Appellant's claim that the instructions of the trial court interfered with the jury's evaluation of his mitigation evidence is without merit, and we do not find counsel ineffective for not pursuing this issue.

6. "Life Means Life" Instruction

Appellant in his next assertion of error, claims that prior counsel was ineffective for not claiming, pursuant to Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), that the trial court erred in failing to instruct the jury that a life sentence means life without the possibility of parole. Simmons requires an instruction that "life" means life without the possibility of parole only when the prosecutor injects concerns of the defendant's future dangerousness into the proceedings. Commonwealth v. Gibson, 547 Pa. 71, 105, 688 A.2d 1152, 1169, cert. denied. 522 U.S. 948, 118 S.Ct. 364, 139 L.Ed.2d 284 (1997). At the time of the trial of Appellant in 1993, however, Simmons had not been decided, and the law in Pennsylvania prohibited juries from being informed that "life" means life without parole. Commonwealth v. Speight, 544 Pa. 451, 469, 677 A.2d 317, 326 (1996), cert. denied, 519 U.S. 1119, 117 S.Ct. 967, 136 L.Ed.2d 852 (1997) (citing Commonwealth v. Christy, 540 Pa. 192, 217, 656 A.2d 877, 889, cert. denied, 516 U.S. 872, 116 S.Ct. 194, 133 L.Ed.2d 130 (1995)). Counsel for Appellant did not request a "life means life" instruction, nor did Appellant pursue this issue as a claim of trial court error or ineffective assistance of counsel on direct appeal. Where a defendant raises a Simmons claim in collateral proceedings, we have held that there is no entitlement to relief because we have

refused to give Simmons retroactive effect. Commonwealth v. Abu-Jamal, 553 Pa. 485, 720 A.2d 79, 120 (1998). Consequently, Appellant's claim must fail.

F. Introduction of Evidence Not Related to Aggravating Factor

Appellant contends that counsel was ineffective for failing to challenge the admissibility of certain evidence which, he claims, the Commonwealth improperly introduced to establish aggravating circumstances not related to any statutory aggravating factor. First, Appellant contends that the Commonwealth's question to Dr. Martone concerning his dangerousness to others improperly placed an issue of his future dangerous before the jury. Second, the Commonwealth's commentary on Appellant's lack of remorse allowed the jury to consider his "silence" against him in the penalty stage. Finally, Appellant argues that the Commonwealth introduced victim impact testimony when, during cross-examination of Appellant's daughter, Karen Stevens, the prosecutor asked her if she had had a good relationship with her mother and whether she missed her mother.

The record does not support Appellant's claim that the Commonwealth improperly argued his future dangerousness to the jury. During the cross-examination of Dr. Martone, the prosecutor asked, in the midst of a series of questions designed to test the basis of Dr. Martone's testimony regarding Appellant's mental condition, "[t]o a reasonable degree of medical certainty in your expert opinion can you determine if he's dangerous?" N.T., 4/28/93, p. 67. Dr. Martone's responded, "[i]n my opinion he would only be dangerous to certain people. He is not somebody that at random would hurt people." Id. During closing

argument, the prosecutor summarized the testimony from the mental health experts of Appellant to undermine his mitigation case. The prosecutor noted that Dr. Martone had testified that Appellant was not insane and knew the difference between right and wrong. The prosecutor then stated:

> What does that mean? It means that when he [Appellant] walked in the bar on February 8 he had the mental ability to choose doing something other than what he did. He can conform his behavior to normal societal standards. He can walk out the door. "Doctor Martone, is he dangerous?" "No, just to his spouse."

N.T., 4/29/93, p. 20. Contrary to Appellant's contention, the prosecutor was not arguing Appellant's future dangerousness, but instead relied on Dr. Martone's testimony that Appellant was not dangerous to show that Appellant's mental illness did not drive his behavior. Accordingly, this claim is without merit.

Likewise, Appellant's assertion that the Commonwealth improperly referred to his lack of remorse is without merit. Because Appellant testified at the sentencing phase, his claim that the Commonwealth cannot argue that he showed a lack of remorse during that testimony is absurd. Cf. Commonwealth v. Holland, 518 Pa. 405, 543 A.2d 1068 (1988) (where capital defendant did not testify at sentencing hearing, prosecutor's comment on defendant's failure to show remorse was not error).

Appellant's assertion that the Commonwealth improperly introduced victim impact testimony belies the purpose of the Commonwealth in its cross-

examination of Karen Stevens. Appellant had Karen Stevens testify during the mitigation case primarily so that she could testify that, although Appellant murdered her mother, she did not want her father to be executed. During the cross-examination of Ms. Stevens, the prosecutor asked her numerous questions to show that Appellant's mental illness did not affect his ability to appreciate the nature of his actions or impair his ability to plan the murder of his wife. Ms. Stevens apparently became upset while on the witness stand, and the following exchange occurred:

> Q: Did you have a good relationship with your mother, Karen?
>
> A: Yes, I did.
>
> Q: Do you miss your mother?
>
> A: Yes, I do. I miss her a lot.
>
> Q: I know. Karen, I know it's tough. Keep your voice up. Did your father tell you he was going to kill your mother?
>
> A: He only said one time. It was about a week before everything happened, that when I went over there, he said that-he was talking and rambling like he did, and he said that he couldn't believe he didn't go up and shoot her yet, and that's the only time he ever had said anything.

N.T., 4/29/93, p. 12-13. This questioning, while designed to calm an emotionally distressed witness during difficult cross-examination, did elicit testimony

regarding the impact of the murder on the victim's daughter.

In Commonwealth v. Fisher, 545 Pa. 233, 681 A.2d 130 (1996), we held that the version of the capital sentencing statute then in effect did not permit the introduction of victim impact testimony. Fisher, however, is distinguishable. In Fisher, the Commonwealth presented testimony to establish the impact that the murder had on the family of the victim, and requested and received, over trial counsel's objection, a jury instruction on the use of that testimony. Fisher, 545 Pa. at 269-70, 681 A.2d at 147-48. Here, by contrast, the Commonwealth, during cross-examination directed towards other purposes, indirectly questioned the victim's daughter about whether she missed her mother. Furthermore, the Commonwealth requested no jury instruction to focus the jury on Ms. Stevens' testimony, and did not argue "victim impact" during its closing. Likewise, Commonwealth v. McNeil, 545 Pa. 42, 679 A.2d 1253 (1996), cert. denied, 523 U.S. 1010, 118 S.Ct. 1198, 140 L.Ed.2d 327 (1998), is distinguishable. In McNeil, the Commonwealth presented a witness to testify to the character of the victim. Here, the Commonwealth made only a passing reference to the victim's relationship with her daughter during cross-examination. Consequently, we cannot find that Appellant suffered any prejudice from his counsel's failure to object to this testimony.

G. Constitutionality of Proportionality Review

In his next assertion of error, Appellant argues that the proportionality review conducted by this Court

on direct appeal [15] denied him due process because we allegedly do not conduct "meaningful" appellate review. We have repeatedly rejected claims that our comparative proportionality review process is constitutionally defective. See, e.g., Commonwealth v. Porter, 556 Pa. 301, 728 A.2d 890, (Pa. 1999); Commonwealth v. Gribble, 550 Pa. 62, 703 A.2d 426 (1997), cert. denied, 525 U.S. 1005, 119 S.Ct. 519, 142 L.Ed.2d 430 (1998). As we stated in Gribble:

> [W]e examine not only the compiled data from the AOPC [Administrative Office of the Pennsylvania Courts], but we also have at our disposal the verdict sheets and the review forms submitted by the President Judges. This allows us to conduct a thorough review of cases similar to the one in question and provides additional screening for any anomalies that may be present in the AOPC database. We have carefully reviewed these procedures and find nothing arbitrary or capricious in this scheme. Instead, we believe that our proportionality review comports with the General Assembly's desire to afford capital defendants an additional check against

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[15] In 1997, the legislature abolished the comparative proportionality review formerly required by 42 Pa.C.S. § 9711(h)(3)(iii). We have held, however, that for direct review of all cases in which sentence was imposed prior to the effective date of this amendment, we continue to conduct comparative proportionality review. See Commonwealth v. Gribble, 550 Pa. 62, 703 A.2d 426 (1997).

> the arbitrary imposition of the death penalty.

Gribble, 550 Pa. at 91-92, 703 A.2d at 441. Accordingly, we reject Appellant's claim regarding the sufficiency of our system for comparative proportionality review.

H. Presentation of Forensic Evidence

Appellant disputes and says that his former counsel was ineffective in failing to challenge the trial court's admission of testimony from the pathologist, Dr. James Smith, concerning the manner of Brenda Jo Stevens' death. On direct appeal, Appellant challenged the introduction of Dr. Smith's testimony regarding his autopsy of Michael Love on the grounds that this evidence was relevant only for the guilt phase of his trial, and that it had a prejudicial impact when introduced in the sentencing phase. Commonwealth v. Stevens, 543 Pa. 204, 213, 670 A.2d 623, 627 (1996). We denied this claim, holding that "[t]he pathologist's testimony was used in support of the aggravating circumstances of torture and creating a grave risk of death to others." Id. We further held that "[t]his evidence clearly formed the history and natural development of the events for which Appellant was being sentenced." Id. Presently, Appellant raises a similar claim with respect to the introduction of forensic testimony regarding the manner of death of Brenda Jo Stevens. We reject this claim. The Commonwealth had the burden of proving beyond a reasonable doubt the existence of the statutory aggravator of Section 9711(d)(11): that the Appellant had committed a double murder. 42 Pa.C.S. § 9711(d)(11). This testimony was relevant both to explain to the jury the history and natural development

of the case and to prove the double murder aggravator. Appellant's ineffectiveness claim therefore lacks merit.

I. Cumulative Error

Appellant, in his final claim, asserts that the cumulative effect of the errors of the trial court deprived him of his constitutional rights. In view of the fact that we have found no support for Appellant's individual assertions of error, we deny this unfounded claim of cumulative trial court error.

III. CONCLUSION

For the foregoing reasons, we affirm the Order of the trial court and deny the petition of Appellant for post-conviction relief.[16]

Justice ZAPPALA and Justice NIGRO file dissenting opinions.

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[16] Pursuant to 42 Pa.C.S. § 9711(i), the Prothonotary of the Supreme Court is directed to transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition and review, and to give notice to the Secretary of Corrections contemporaneously with this transmission.

[J-267-98]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee	: No. 0229 Capital Appeal Docket
v.	:
ANDRE STEVENS, Apellant	: Appeal from the Order of The Court of Common Pleas of Beaver County dated April 29, 1998 at No. 365A of 1992, denying relief under the Post Conviction Relief Act

SUBMITTED: December 29, 1998

DISSENTING OPINION

ZAPPALA, Justice
DECIDED: October 27, 1999

I respectfully disagree with the majority's conclusion that Appellant was not prejudiced by his trial counsel's failure to pursue a defense of diminished capacity during the guilt phase of his trial.

According to the majority, "the trial court found through circumstantial proof that the Commonwealth had established beyond a reasonable doubt that Appellant had the specific intent to kill, and therefore

determined that Appellant suffered no prejudice by pursuit of a defense that would have been unsuccessful had Appellant's counsel presented it." (Majority Op. at 516). This implies that anytime the Commonwealth has established the elements of a crime then the defendant's criminal liability is unassailable. The majority's sweeping conclusion calls into question the existence of affirmative defenses and diminishes the role of defense counsel.

Counsel may be ineffective where the defense of diminished capacity is available, reasonable investigation would have made counsel aware of the availability of the defense, and the defense does not conflict with other trial strategies. See Commonwealth v. Legg, 551 Pa. 437, 711 A.2d 430 (1998). Furthermore, counsel may also be ineffective where pursuit of a possible defense was curtailed by the lack of reasonable investigation. See Commonwealth v. Mabie, 467 Pa. 464, 359 A.2d 369 (1976).

Appellant's contention is that his counsel failed to provide relevant materials to Dr. Martone and that the absence of these materials, especially the writings that comprised Appellant's journal, led to Dr. Martone's initial misdiagnosis of Appellant. It was this misdiagnosis which Appellant's counsel relied upon in not pursuing a diminished capacity defense. This meant that no further psychiatric examinations were made, no witnesses were interviewed, and no trial strategy was devised regarding the diminished capacity defense.

The PCRA court determined that Appellant suffered no prejudice by his counsel's failure to pursue this defense. It held that it would have found that Appellant had, and exhibited, the specific intent to kill

despite Dr. Martone's revised diagnosis as presented at the PCRA hearing. I believe that the PCRA court as well as the majority fails to consider the full effect of counsel's error in failing to provide the documents needed to correctly diagnose Appellant. Rather, their consideration is limited to whether Dr. Martone's testimony during the PCRA hearing would have been sufficient to establish reasonable doubt when set against the evidence offered by the Commonwealth at trial. This may have indeed been the proper analysis had Appellant presented Dr. Martone's revised diagnosis as after-discovered evidence. However, Dr. Martone's revised diagnosis, set against her testimony at trial, is offered to show counsel's ineffectiveness in failing to pursue a vigorous and viable defense. Counsel's failures precluded not only Dr. Martone's correct testimony at trial, but also any other evidence, which was not discovered due to counsel's failure. Since it is impossible for the trier of fact to fully anticipate and properly weigh a defense that was never prepared and never presented, it is impossible for the PCRA court to state that Appellant was not prejudiced by such failure.

I dissent, as I would remand to the PCRA court to reconsider Appellant's claim that counsel could have developed a viable diminished capacity defense had counsel provided Dr. Martone with the proper materials to obtain a correct diagnosis in the first instance.

[J-267-98]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA Appellee	: No. 0229 Capital Appeal Docket
v.	: Appeal from the Order of
ANDRE STEVENS, Apellant	: The Court of Common Pleas of Beaver County dated April 29, 1998 at No. 365A of 1992, denying relief under the Post Conviction Relief Act

SUBMITTED: December 29, 1998

DISSENTING OPINION

NIGRO, Justice

DECIDED: October 27, 1999

Based on the narrow set of circumstances presented in this case, I agree with Justice Zappala that the matter should be remanded to the PCRA court for reconsideration of Appellant's claim that his counsel could have developed a viable diminished capacity defense had counsel provided Dr. Martone with the proper materials to obtain a correct diagnosis in the first instance.

Appendix D

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA, CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. 365 of 1992
v.	:	
ANDRE STEVENS	:	

ORDER

Kunselman, J. April 29, 1998

Upon consideration of Defendant's Petition for Habeas Corpus relief Under Article I, Section 14 of the Pennsylvania Constitution and Post-Conviction Relief Under the Post Conviction Relief Act, the Commonwealth's Reply thereto, the original record, the record from the PCRA hearing, the briefs and arguments made on behalf of the parties, and the relevant caselaw, the relief sought by Defendant is refused and the Petition is dismissed. An opinion explaining our reasons for doing so will be issued in due course. Further, the Order issued on November 8, 1996 staying Defendant's execution shall be revoked unless Defendant files a timely appeal.

Defendant is advised that he has a right to appeal from this Order within thirty (30) days of the date hereof.

The Clerk of Courts shall mail a copy of this Order to Defendant by certified mail return receipt

requested and mail a copy of this Order by regular mail to counsel for Defendant and for the Commonwealth.

BY THE COURT,

/S/ ROBERT E. KUNSELMAN
J.

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA, CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. 365 of 1992
v.	:	
ANDRE STEVENS	:	

OPINION

Kunselman, J July 1, 1998

This is an appeal from our Order dated April 29, 1998 denying the Petition for Post Conviction Relief filed on behalf of Andre Stevens ("Appellant"). The history of this case is as follows.

Appellant was charged with two counts of murder in the first degree for the shooting deaths of Brenda Stevens ("Stevens"), Appellant's wife, and Michael Love ("Love"). For these murders, the Commonwealth intended to seek the death penalty. Following a non-jury trial before the undersigned, Appellant was found guilty on both counts. Immediately thereafter, the sentencing phase of the trial proceeded with a jury. Based upon the evidence presented, the jury found the grave risk, and multiple victim aggravating circumstances with respect to the murder of Stevens. In addition to these aggravating circumstances, the jury found the aggravating circumstance of torture with respect to the murder of Love. As to mitigating circumstances the jury found that Appellant had no significant history of prior

criminal convictions and that he was under extreme mental and emotional disturbance with respect to both victims. Having concluded that the aggravating circumstances outweighed the mitigating circumstances, the jury returned a verdict of death on both counts on April 29, 1993.

Post-trial motions for arrest of judgment and new trial were denied by this court en banc on July 14, 1994. Upon direct appeal, the Pennsylvania Supreme Court affirmed the conviction and sentence of death on January 18, 1996. Commonwealth v. Stevens, 543 Pa. 204, 670 A.2d 623 (1996). On May 8, 1996, Governor Ridge signed a death warrant to be executed the week of June 2, 1996. Upon Appellant's request, the execution was stayed by the Pennsylvania Supreme Court on May 23, 1996. He then petitioned the United States Supreme Court for Writ of Certiorari, which was denied on October 7, 1996. Another Warrant of Execution was signed by Governor Ridge on November 4, 1996; said execution to be scheduled for the week beginning November 17, 1996.

On November 6, 1996, Appellant filed a pro se petition seeking relief under the Post Conviction Relief Act ("PCRA"). On November 7, 1996, in response thereto, we appointed Robert Dunham, Executive Director of the Center for Legal Education, Advocacy & Defense Assistance, to represent Appellant in these PCRA proceedings and directed that an amended petition be filed. On November 8, 1996, we granted Appellant's Motion to Stay Execution. On March 10, 1997, pursuant to an extension of time, an Amended PCRA Petition was filed raising numerous issues. Upon review of the Amended Petition and Answer thereto, we concluded that most of the issues raised could be determined from the existing record. We granted an

evidentiary hearing on two matters: 1) Whether trial counsel should have conducted further additional investigation on mental health issues; and 2) the proportionality review on direct appeal. See Order dated 7/22/97. Hearing on these matters was held on January 26, 27, 28, and 29, 1998. At the conclusion of the hearing, we scheduled argument on Appellant's petition and ordered briefs.

Counsel for both parties focused on matters addressed at the evidentiary hearing in their written briefs and oral argument on February 25, 1998. Following oral argument, both parties indicated to the court that it was their intention that the court look to their petition and answer for their respective arguments on the other issues raised by Appellant.

On April 29, 1998, after review of the original record, the record made during the PCRA hearing, the parties' arguments and relevant caselaw, we entered an Order denying Appellant the relief sought in his Amended Petition for Post Conviction Relief. The following is provided to explain our reasons for doing so.

In his Amended Petition, Appellant sees to vacate his convictions and death sentences, and requests that a new trial be granted. Alternatively, Appellant requests that his death sentence be vacated and a life sentence imposed, or that he be afforded a new capital sentencing hearing. Appellant claims he is entitled to this relief based upon a number of constitutional errors and claims of ineffectiveness assistance of counsel. We will first address the issues on which we granted an evidentiary hearing and then will discuss the other issues in the order in which they were raised.

* * *

Issue 3: Life Qualification/Death Qualification

Appellant contends that his death sentence must be reversed because the court improperly excused jurors based upon their reservations about the death penalty in violation of his right to an impartial jury established by the Sixth and Fourteenth Amendments and Article I, Section 9. Appellant asserts that a juror may only be excused for cause where his or her beliefs about the death penalty would substantially impair their ability to perform the duties of a juror in accordance with the court's instructions and oaths. Appellant argues that the court, to the contrary, excused one or more jurors in this case because they voiced general objections to the death penalty. In particular, Appellant directs our attention to the voir dire of juror Nancy Hartling. Amend. Pet. p. 30-32.

The court conducted the voir dire examination of the potential jurors initially, and then permitted the attorneys to conduct any additional voir dire. A review of the voir dire record discloses that in examining Mrs. Hartling, the following exchange occurred:

> THE COURT: As you know you are being considered as a juror in a case involving the deaths by homicide of Brenda Jo Stevens and Michael Love. . . . The Defendant is Andre Stevens and the Commonwealth has secured a verdict of guilty of murder of the first degree with respect to both of those deaths. It is now up to a jury to determine whether to impose the penalty of death or the penalty of life imprisonment upon Mr. Stevens.

> Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?
>
> A. I don't believe in the death penalty.

OT 4/22/93 vol. I, p.161. Upon the Commonwealth's challenge, the court struck Mrs. Hartling for cause. No objection was made by defense counsel.

In his Amended Petition, Appellant characterizes Mrs. Harlting's response as a generalized objection to capital punishment and asserts that she never stated that she would not be able to set her beliefs aside or follow the law as instructed by the court. Thus, Appellant contends that her removal without further inquiry was improper. Amend. Pet. p. 33. We disagree.

"It is well settled that a prospective juror may be excluded for cause when his views on capital punishment are such as would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Commonwealth v. Holland, 518 Pa. 405, 416, 543 A.2d 1068 (1988) (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)). Thus, the relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45, (1980)). While the record shows that this inquiry was not made of Mrs. Hartling, what cannot be discerned from the record is the tone of her response and her demeanor when she responded to our question.

The decision to disqualify a potential juror is within the sound discretion of the judge. Commonwealth v. Colson, 507 Pa. 440, 454, 490 A.2d 811, cert denied, 476 U.S. 1140, 106 S.Ct. 2245 (1985). In determining whether a prospective juror will be able to perform his or her duties as a juror, it is proper for the court to consider a juror's demeanor in addition to that juror's response during voir dire. See Holland, 518 Pa. at 417-18.

Contrary to Appellant's allegation, we did not summarily dismiss Mrs. Hartling. Rather, our decision was based upon her statement and the manner in which it was made. Although we have no specific recollection of Mrs. Hartling and the transcript is incapable of reflecting the tone of her response as well as her demeanor in so responding, had this juror's answer not been emphatic and clearly conveyed her unwillingness to comply with the court's instructions, we would not have sustained a challenge for cause. As is apparent from the record, we repeatedly asked jurors whether they would be able to set aside their opinions—whatever it might be—and follow the court's instructions. Moreover, the Commonwealth's immediate challenge for cause, without objection from defense counsel, is corroborative of Mrs. Hartling's adamant position.

We were also guided by Holland in concluding that our action was proper. In that case the defendant complained that a potential juror had been improperly excused for cause. The potential juror had started that she did not believe in the death penalty. Although further inquiry was made, she hedged on the questioning and never definitively stated whether she could put that belief aside. Holland, at 418 fn. As a result the court was essentially left with the juror's

statement that she did not believe in the death penalty. See id. at 416-17. Despite this, our Supreme Court concluded that the trial court had properly dismissed this potential juror for cause. Id. at 416-17.

Appellant further argues that trial counsel was ineffective for failing to: 1) undertake voir dire of Mrs. Hartling to rehabilitate her and determine whether she would ignore her oath and the law as given by the judge; 2) object to her dismissal, and 3) raise this issue during post0verdict motions and on appeal. Amend. Pet. p. 34, 44.

We find no merit to these complaints. Counsel cannot be considered ineffective "for declining to attempt to rehabilitate veniremen who have emphatically expressed their inability to impose the death sentence . . . ; nor is counsel ineffective for failing to object to challenges for cause to such veniremen." Commonwealth v. Peterkin, 511 Pa. 299, 320, 513 A.2d 373, cert denied, 479 U.S. 1070 (1986). Where the record provides no basis for finding that the perspective juror was erroneously excluded, counsel cannot be deemed ineffective. Holland, 518 Pa. at 418-19.

* * *

APPENDIX E

COURT OF COMMON PLEASE
FOR THE COUNTY OF BEAVER

COMMONWEALTH OF PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs. No. 365A of 1992

ANDRE STEVENS

TRANSCRIPT of stenographic notes of testimony taken and proceedings had in the above-entitled JURY SELECTION before ROBERT E. KUNSELMAN, J., in Courtroom No. 3, Courthouse, Beaver, Pennsylvania, on April 22nd, 1993, commencing at 10:41 o'clock a.m., prevailing time.

APPEARANCES:

THERESA FERRIS-DUKOVICH, ESQ., JOHN BROWN, ESQ., ANTHONY J. BEROSH, ESQ.
Appearing on behalf of the Commonwealth

WAYNE S. LIPECKY, ESQ., THOMAS C. PHILLIS, ESQ.
Appearing on behalf of the Defendant

PRESENT:
The Defendant

* * *

NANCY HARTLING, having previously been sworn, answered the following questions in the following manner:

THE COURT: Is it Miss or Mrs. Hartling?

A. Miss

THE COURT: What's your full name, Miss Hartling:

A. Nancy Margaret Hartling

THE COURT: Where do you live?

A. New Brighton

THE COURT: In the Borough

A. Yes, uh-huh

THE COURT: As you know you are being considered as a juror in a case involve the deaths by homicide of Brenda Jo Stevens and Michael Love. This occurred on February 8, 1992, at Armando's Restaurant/Bar located in Rochester Township. The Defendant is Andre Stevens and the Commonwealth has secured a verdict of guilty of murder of the first degree with respect to both of those deaths. it is now up to a jury to determine whether to impose the penalty of death or the penalty of life imprisonment upon Mr. Stevens. do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?

A. I don't believe in the death penalty.

THE COURT: Very Well.

MRS. DUKOVICH: Challenge for cause, Your Honor.

THE COURT: Very well. You are excused, thank you.

(Juror excused).

* * *

(2)

NO. 06-511

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; CONNER BLAINE, Superintendent State Correctional Institution at Greene; JOSEPH P. MAZURKIEWICZ, Superintendent State Correctional Institution at Rockview,

Petitioners,

v.

ANDRE STEVENS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

MATTHEW LAWRY, ESQ.
Supervisory Assistant Federal Defender
BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Federal Community Defender Office for the
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Counsel for Respondent, Andre Stevens

Dated: January 12, 2007

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court grant certiorari in order to review the unanimous rulings of the lower federal courts, after giving appropriate deference to the state court rulings, that the prosecution failed to carry its burden of establishing that a juror was excludable under well established precedent, see Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. 412 (1985); and that the state courts' contrary rulings were unreasonable, as well as clearly and convincingly erroneous?

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28 U.S.C. § 2254(e) 1, 4, 5, 6

For the reasons stated below, this Court should deny the petition for writ of certiorari, which does not present any important federal question but, instead, merely asks this Court to review the lower courts' application of well-established law, including the standards for review of state court decisions provided in 28 U.S.C. § 2254(d) and (e), to the facts of this case.[1]

COUNTER-STATEMENT OF THE CASE

A. Relevant Sixth and Fourteenth Amendment Decisions: The governing law with respect to exclusion of jurors based on their views regarding the death penalty is well established. This Court first addressed the issue at length in Witherspoon v. Illinois, 391 U.S. 510 (1968). Witherspoon held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause *simply because they voiced general objections to the death penalty* or expressed conscientious or religious scruples against its infliction." Id. at 522. The Court indicated it was particularly concerned by the exclusion of prospective jurors who "said they did not 'believe in the death penalty'" and were then immediately excused, "without any attempt to determine whether they could nonetheless return a verdict of death." Id. at 514. As the Court noted, it is "entirely possible" that a juror who is resolutely opposed to the death penalty "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." Id. at 514 n.7.

This Court returned to the issue in Adams v. Texas, 448 U.S. 38 (1980). The Court

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[1]The petition for writ of certiorari is cited herein as "*Petition*." Petitioners are referred to as "the Commonwealth." The Commonwealth has filed an Appendix, which is cited herein as "Pet. App." followed by the page number. All emphasis herein is supplied unless otherwise indicated. Parallel citations are omitted.

restated the Witherspoon standard as follows:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45.

In Wainwright v. Witt, 469 U.S. 412 (1985), this Court clarified two aspects of the law relating to juror exclusions: (1) that the proper standard is the one stated in Adams, i.e., "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,'" Witt, 469 U.S. at 424; and (2) that a state court's finding of juror bias is a finding of fact entitled to a presumption of correctness under the then-extant version of 28 U.S.C. § 2254(d). Id. at 426-29.[2] Applying the Adams standard and the presumption of correctness, this Court concluded that the state court had properly excused a juror who repeatedly indicated that her personal opposition to the death penalty likely would interfere with her ability to judge the guilt or innocence of the defendant. Id. at 434-35; see id. at 416 (when asked if her views would "interfere" with her performance as a juror, juror replied, "'*I am afraid it would*'"; "'*I think so*'"; and "'*I think it would*'"). Witt, Adams and Witherspoon continue to govern the circumstances under which a juror may be excluded because of his or her bias with respect to the death penalty.

B. The Stevens State Court Proceedings: Mr. Stevens was convicted at a bench trial of two counts of first degree murder. Following the bench trial, the court impaneled a jury

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[2]This Court also made clear that "it is the adversary seeking exclusion who must demonstrate, *through questioning*, that the potential juror lacks impartiality." Id. at 423.

for capital sentencing. The first potential juror to express any concerns about the death penalty – and the only juror to do so on the first day of jury selection – was Nancy Hartling. Pet. App. 23a. The sole substantive question the court asked Ms. Hartling was as follows: "Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?" Pet. App. 2e. Ms. Hartling responded, "I don't believe in the death penalty," upon which the prosecution immediately challenged her for cause, and the court excused her without objection from the defense or further discussion. Pet. App. 3e.

The capital sentencing jury found both aggravating and mitigating circumstances, and sentenced Mr. Stevens to death on both counts of first degree murder. Pet. App. 3d-4d. The Pennsylvania Supreme Court affirmed the convictions and death sentences on direct appeal. Commonwealth v. Stevens, 670 A.2d 523 (Pa.), cert. denied, 519 U.S. 855 (1996).

In state post-conviction proceedings, Petitioner alleged that the trial court excluded Ms. Hartling from the jury in violation of his right to an impartial jury under the Sixth and Fourteenth Amendments, and that trial and appellate counsel were ineffective for failing to object and raise this issue. Pet. App. 7d-9d. The state trial judge – Judge Kunselman – rejected the claim on the merits.

Judge Kunselman acknowledged that the "relevant inquiry" under Witt and Adams – into whether the juror's views would prevent or substantially impair the performance of her duties – *"was not made of Mrs. Hartling."* Pet. App. 7d. He stated a belief that "the tone of [Ms. Hartling's] response and her demeanor when she responded to our question" made up for the absence of the "relevant inquiry." Id. However, Judge Kunselman admitted that he had *"no specific recollection of Mrs. Hartling."* Pet. App. 8d. Judge Kunselman simply assumed that

"had this juror's answer not been emphatic and clearly conveyed her unwillingness to comply with the court's instructions, we would not have sustained a challenge for cause." Id.

Petitioner raised both the Witherspoon/Witt claim and the ineffective assistance claim on appeal of the trial court's denial of relief, exhausting both claims. Pet. App. 18a-19a & n.11. The Pennsylvania Supreme Court affirmed the denial of relief, relying on "the statement of the trial court in its opinion ... that its decision not to conduct further inquiry with respect to this juror was based on its assessment of her demeanor in responding to the question." Commonwealth v. Stevens, 739 A.2d 507, 521 (Pa. 1999); Pet. App. 27c.

C. Federal Court Proceedings: After exhausting state remedies, Mr. Stevens filed a petition for writ of habeas corpus in the District Court raising the Witherspoon/Witt claim and several other constitutional challenges to his conviction and death sentence.

The District Court treated the state court rulings as rulings on the merits of the Witherspoon/Witt claim.[3] Recognizing that the issue of juror bias is generally characterized as a factual determination, the District Court applied both 28 U.S.C. §§ 2254(d)(2) and (e)(1) in reviewing the state court decisions, finding that Petitioner had made the required showing under both provisions. Stevens v. Horn, 319 F. Supp. 2d 592, 599 & n.4 (W.D. Pa. 2004); Pet. App. 11b-12b and n.4.

In analyzing the claim, the District Court first set forth the governing standard from Witherspoon and Witt. Pet. App. 13b-14b. Recognizing that the state court's finding as to Ms. Hartling was entitled to a presumption of correctness, the District Court concluded that the

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[3]Neither in the lower federal courts nor here has the Commonwealth contended that there is any independent and adequate procedural bar to review of the merits of the Witherspoon claim.

presumption of correctness was overcome because there was *no support in the record* for the trial court's finding:

> [E]ven under AEDPA's standards of review there must be some actual support reflected in the record to support the conclusion that the potential juror would not be able to set aside his or her bias against the death penalty and apply the law as instructed by the trial court. In this case, there is no such support.
>
> * * *
>
> [T]he veniremember in this case expressed only her general opposition to capital punishment.

Pet. App. 18b-19b (citations omitted).

As the District Court concluded:

> Here, the veniremember made only one statement: "I don't believe in the death penalty." Even through the lens of AEDPA's standards of review, the trial court's assessment of bias on that statement alone amounts to constitutional error.

Pet. App. 23b.

The District Court noted that Witherspoon violations are not subject to harmless error analysis. Pet. App. 23b, citing Gray v. Mississippi, 481 U.S. 648, 668 (1987); Davis v. Georgia, 429 U.S. 122, 123 (1976) (per curiam).[4] Having found a violation of Witherspoon, and that the state trial court's contrary ruling was unreasonable and unsupported by the record, the District Court granted Petitioner a new sentencing hearing. Pet. App. 23b-24b. The Commonwealth appealed to the Third Circuit.

In reviewing the state courts' finding, the Third Circuit applied 28 U.S.C. § 2254(e)(1), rather than § 2254(d)(2). See Stevens v. Horn, 187 Fed. Appx. 205, 212-13 & n.10 (3d Cir.

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[4]Respondents have not challenged that ruling in the courts below or in this Court.

2006); Pet. App. 17a and n.10.[5] The Third Circuit "agree[d] with the District Court that Stevens met [his] burden" of rebutting the (e)(1) presumption of correctness by clear and convincing evidence. Pet. App. 19a-20a.[6]

Like the District Court, the Third Circuit relied on the *complete absence from the record* of any evidence supporting a conclusion that Ms. Hartling was biased:

> [Ms. Hartling] indicated no more than that she opposed the death penalty. Because the trial judge did not follow up Hartling's single statement with any follow-up questioning, there is simply no tangible evidence in the record to support the finding of the state courts. In the absence of *any* evidence in the record to support the state courts' finding, it must be true that Stevens has established, by the requisite clear and convincing evidence, that Hartling was removed for cause on a "broader basis than inability to follow the law or abide by [her] oath [as a juror]." Indeed, the record supports but a single conclusion – that Hartling was removed merely because she expressed opposition to the death penalty.

Pet. App. 20a (quoting Adams, 448 U.S. at 48) (emphasis original) (citation omitted).

The state court's assumption that Ms. Hartling was emphatic in her demeanor when she stated her opposition to the death penalty did not alter the result. As the Third Circuit explained, Witherspoon requires the trial and reviewing courts to distinguish between (1) opposition to the

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[5]The Third Circuit explained that, in its view, subsection (e)(1) is more applicable to the juror bias finding at issue here, and that in any event it is more difficult for a habeas petitioner to rebut the (e)(1) presumption of correctness than to make the (d)(2) unreasonableness showing. Id. While the Commonwealth seeks review of the Third Circuit's application of subsection (e)(1), it has not challenged the Third Circuit's decision to focus on (e)(1) as opposed to (d)(2).

[6]This Court today granted a petition for writ of certiorari in Brown v. Lambert, 451 F.3d 946 (9th Cir. 2006), cert. granted sub nom. Uttecht v. Brown, No. 06-413 (U.S. Jan. 12, 2007). The certiorari petition in Brown asserts that the Ninth Circuit failed to apply the statutory presumption of correctness, Petition for Writ of Certiorari at i, and notes that the Third Circuit has correctly applied the presumption. Id. at 18 (citing Martini v. Hendricks, 348 F.3d 360 (3d Cir. 2003)). The Third Circuit's ruling here, which did apply the § 2254(e)(1) presumption of correctness, is thus evidently quite different from the Ninth Circuit's ruling in Brown.

death penalty – however strongly felt or expressed – which does *not* justify exclusion from the jury, and (2) interference with the juror's ability to perform her duties, which the State must establish if it is to exclude the juror:

> Even *if* Hartling *emphatically* stated that she did not "believe in" the death penalty, all that could reasonably be inferred is that her moral opposition to capital punishment was strongly felt. Supreme Court precedent makes clear, however, that the true question was whether Hartling would have been able to set aside her "conscientious or religious scruples against" the death penalty, Witherspoon, 391 U.S. at 522, and "faithfully and impartially apply the law." Witt, 469 U.S. at 426. That Hartling's "conscientious or religious scruples" were strongly felt says remarkably little about whether she could follow the trial court's instructions.

Pet. App. 21a (emphasis original) (citing Lockhart v. McCree, 476 U.S. 162, 176 (1986)).

The Third Circuit also discussed its Witherspoon decisions in habeas corpus cases. See Szuchon v. Lehman, 273 F.3d 299 (3d Cir. 2001); Martini v. Hendricks, 348 F.3d 360 (3d Cir. 2003). In Szuchon, as here, a prospective juror was excused immediately after he answered a question about whether he could convict the defendant of first degree murder by answering, "I do not believe in capital punishment." Szuchon, 273 F.3d at 329-30. After affording a presumption of correctness to the state court decision, the Third Circuit found a Witherspoon violation, noting that the prosecutor had failed "to meet his burden under Witt of asking even a limited number of follow-up questions to show that [the juror's] views would render him biased." Id. at 331. As the Third Circuit noted, the facts of this case are virtually identical to those in Szuchon. Pet. App. 19a-20a.

In Martini, in contrast, there was a colloquy of the excluded juror. At times, he emphatically expressed his ability to set aside his personal beliefs and follow the court's instructions. Other responses given by the juror "create[d] considerable doubt" as to whether he

could do so. Martini, 348 F.3d at 366. On that record, while finding the habeas petitioner's claim of Witherspoon error "plausible," the Third Circuit deferred to the state trial court's ruling: "We cannot say by clear and convincing evidence that the state trial judge, who saw [the juror] and doubtless 'sized him up,' was incorrect in his finding." Id. at 368. The critical difference between this case and Szuchon on the one hand, and Martini on the other, was that there was support in the record for the trial court's ruling in Martini, while there was no such support here or in Szuchon. Pet. App. 18b.

The Third Circuit has only granted Witherspoon relief here and in Szuchon – cases where the excluded juror said nothing beyond an expression of opposition to the death penalty. In cases involving an actual inquiry into the Adams/Witt factors, the Third Circuit has deferred to trial court findings of juror bias. In addition to Martini, see Riley v. Taylor, 277 F.3d 261, 307-09 (3d Cir. 2001) (en banc); Deputy v. Taylor, 19 F.3d 1485, 1498-99 (3d Cir. 1994); Lesko v. Lehman, 925 F.2d 1527, 1547-48 (3d Cir. 1991).

Having found here that the exclusion of Ms. Hartling violated Witherspoon and Witt, and that Mr. Stevens had rebutted the presumption of correctness accorded to the state court finding, the Third Circuit affirmed the District Court's grant of a new sentencing hearing. Pet. App. 26a.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE COMMONWEALTH'S ONLY QUARREL IS WITH THE THIRD CIRCUIT'S APPLICATION OF PROPERLY STATED RULES OF LAW, INCLUDING AEDPA DEFERENCE, TO THE FACTS OF THIS CASE.

A writ of certiorari is "granted only for compelling reasons." Supreme Court Rule 10. This Court's certiorari jurisdiction is "exercised sparingly, and only in cases of peculiar gravity and general importance." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). In particular, this Court does not grant the writ simply to correct purported error by the lower court, which is what the Commonwealth asks this Court to do here. See Watt v. Alaska, 451 U.S. 259, 275 n.5 (1981) (Stevens, J., concurring) ("certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases"); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 190-91 (6th ed. 1985) (same).

A. The Courts Below Correctly Found that the Exclusion of Ms. Hartling Violated This Court's Governing Sixth and Fourteenth Amendment Precedent.

In Witherspoon, this Court held as follows:

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

Id. at 522-23.

In cases decided after Witherspoon, this Court clarified the standard for determining whether a juror is sufficiently biased that she may be excluded from service. In *no case* has this Court wavered from the core holding of Witherspoon – that a juror may not be excused for cause

"simply because [she] voiced general objections to the death penalty." Id. at 522. This Court's Witherspoon decisions make it crystal clear that where, as here, a juror is dismissed immediately upon "voic[ing] general objections to the death penalty," with no further inquiry, her excusal for cause violates the Sixth and Fourteenth Amendments.

1. In Adams, this Court applied Witherspoon o a Texas statute, under which jurors were excluded if they indicated that the potential death penalty "would have any effect at all on [their] performance of their duties." Adams at 49. This Court found the Texas procedure to be unconstitutional:

> Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally.... But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty.... [T]o exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Id. at 49-50. Adams thus reiterated that a juror's views and feelings about the death penalty are not sufficient in themselves to justify the juror's exclusion; rather, the question is whether those views and feelings would prevent the juror from following the court's instructions and obeying the juror's oath.

2. In Witt, this Court recognized that Witherspoon required courts to distinguish "between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." Witt, 469 U.S. at 421.

It held that courts should apply the Adams test in making that distinction, and that the party seeking exclusion of a juror has the burden to "demonstrate, through questioning, that the juror lacks impartiality." Id. at 423 (citing Reynolds v. United States, 98 U.S. 145, 157 (1879)).

3. In Lockhart v. McCree, 476 U.S. 162 (1986), this Court again explained the limited basis for excluding jurors that is permitted under Witherspoon:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who *firmly* believe that the death penalty is unjust *may nevertheless serve as jurors* in capital cases so long as they state clearly that they are *willing to temporarily set aside their own beliefs* in deference to the rule of law.

Id. at 176. Again, firm opposition to the death penalty is not enough to justify exclusion; only an unwillingness to set aside such opposition is enough to justify exclusion.

4. The Court returned to this theme in Gray v. Mississippi, 481 U.S. 648 (1987). After quoting the above passage from Lockhart, the Court explained:

> The State's power to exclude for cause jurors from capital juries *does not extend beyond its interest in removing those jurors* who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Wainwright v. Witt,* 469 U.S. at 423, 105 S. Ct., at 851. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It "stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law." *Witherspoon v. Illinois,* 391 U.S., at 523, 88 S. Ct., at 1778.

Gray, 481 U.S. at 658-59. In Gray, this Court also emphasized that deference to a trial court's findings of fact "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law," id. at 661 n.10 (citing Richmond v. Rogers, 365 U.S. 534, 547 (1961)), and that the State could not demonstrate error in the trial court's refusal to remove certain jurors for cause where there was "inadequate questioning regarding the venire

members' views." Id. at 663.

5. Finally, in Morgan v. Illinois, 504 U.S. 719 (1992), this Court again noted that the principles of Witherspoon "*demand inquiry* into whether the views of prospective jurors on the death penalty would disqualify them from sitting." Id. at 731.

The Commonwealth has not asked this Court to reconsider any of those decisions. And there is no genuine question that the exclusion of Ms. Hartling violated the principles set forth in the Witherspoon decisions from this Court. The sole relevant statement made by Ms. Hartling, and the sole basis for her removal for cause, was her statement: "I don't believe in the death penalty." Pet. App. 3e. The core holding of Witherspoon is that a prospective juror may not be excluded for cause "simply because [she] voiced [such] general objections to the death penalty." Witherspoon, 391 U.S. at 522. Similarly, Adams and Witt hold that in order to exclude a juror, the State has the burden, Witt, 469 U.S. at 423, of demonstrating that a prospective juror's views about the death penalty "would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." Id. at 424; Adams, 448 U.S. at 45. In order to meet that burden, there must be questioning concerning the juror's views. Witt, 469 U.S. at 423; Gray, 481 U.S. at 663. Here, neither the Commonwealth nor the trial court conducted any questioning of Ms. Hartling, and the Commonwealth utterly failed to show how, if at all, Ms. Hartling's opposition to the death penalty would affect her performance of her duties as a juror.

Nevertheless, the Commonwealth briefly argues that the Third Circuit's opinion conflicts with Witt, because Witt instructed that "deference must be paid to the trial judge who sees and hears the juror." *Petition* at 16 (quoting Witt, 469 U.S. at 424-25). This argument is baseless.

As it explicitly noted, the Third Circuit was well aware of the requirement that it defer to the trial court's finding. Pet. App. 17a ("a trial judge is in the best position to judge the credibility and demeanor of potential jurors during voir dire"). Here, however, the trial court made its finding on the basis of no more than an expression of opposition to the death penalty. As shown above, every one of this Court's Witherspoon decisions has recognized that opposition to the death penalty alone *is not enough* to support exclusion of a prospective juror. Where, as here, the trial court admittedly never engaged in the "relevant inquiry" under Witt and Adams, Pet. App. 7d, it is the trial court's exclusion of the juror – not the Third Circuit's ruling – that is inconsistent with Witherspoon, Adams and Witt.

On this record, it is quite apparent that, as the District Court found, Ms. Hartling "expressed only her general opposition to capital punishment." Pet. App. 19b. Her exclusion thereofore violated Witherspoon. As the Third Circuit put it, "Because Hartling was removed from the venire on the sole basis of her statement that she opposed capital punishment, Stevens was denied his constitutional right to a fair and impartial jury." Pet. App. 26a (citing Witherspoon, 391 U.S. at 522).

B. The Courts Below Correctly Ruled that the State Court's Finding of Bias Was Clearly and Convincingly Wrong.

The Commonwealth contends that the lower federal courts failed to give appropriate deference to the state court's finding of bias. Nothing, however, could be further from the truth. The District Court and the Third Circuit both deferred to the state court ruling. Pet. App. 12b (District Court applies standard of review under 28 U.S.C. § 2254(d)(2), i.e., whether state court ruling "resulted in a decision that was based on an unreasonable determination of the facts"; also

considers presumption of correctness under § 2254(e)(1) "relevant to this analysis"); Pet. App. 17a (Third Circuit holds state court's ruling entitled to § 2254(e)(1) presumption of correctness).[7] The Commonwealth's arguments are baseless.

1. The Commonwealth first urges that the Third Circuit "'set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record ....'" *Petition* at 9 (quoting Rice v. Collins, 126 S. Ct. 969, 972 (2006)). According to the Commonwealth, the Third Circuit ignored the trial judge's retrospective assumption – made several years after the fact – that he had relied on Ms. Hartling's demeanor in excusing her. *Petition* at 10-13 (quoting Pet. App. 7d-8d (trial court opinion); Pet. App. 26c-27c (Pennsylvania Supreme Court opinion); and Pet. App. 22a-23a (Third Circuit opinion). The Commonwealth's argument relies on selectively quoting from the Third Circuit's opinion – the Third Circuit actually took full account of the trial court's *post hoc* reliance on Ms. Hartling's purported demeanor.

The Third Circuit first pointed out the trial judge indicated that while he could not actually "remember the interchange with Hartling," he assumed that he "must have been relying on something emphatic in her demeanor." Pet. App. 20a. The Third Circuit acknowledged that a trial judge "is certainly entitled to rely on a potential juror's demeanor," id., but emphasized that under Witt there should be at least *some* support in the record for the trial judge's findings. Pet. App. 21a (citing Witt, 469 U.S. at 434).

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[7]As the Third Circuit noted, if a habeas petitioner rebuts the § 2254(e)(1) presumption of correctness, he has necessarily shown that the state court's decision "was based 'on an unreasonable determination of the facts' under § 2254(d)(2)." Pet. App. 17a n.10. Thus, the § 2254(e)(1) presumption applied by the Third Circuit was the standard most friendly to the Commonwealth.

Moreover, accepting the trial judge's statement that there was something "emphatic" about Ms. Hartling's demeanor, an emphatic expression of opposition to the death penalty by itself simply is not sufficient to support a challenge for cause. Pet. App. 21a. The Third Circuit did not ignore or "set aside" the trial judge's statement about Ms. Hartling's demeanor; rather, it held – consistent with Witherspoon, Witt and Lockhart – that her demeanor alone, in the absence of any questioning about her ability to set aside her opposition to the death penalty, was not enough to support a challenge for cause.[8]

2. The trial court asked Ms. Hartling a compound question:

> Q. Do you [1] have an opinion about the death penalty [2] which would prevent you from following the Court's instructions as to what penalty should be imposed?

Pet. App. 19b (quoting Pet. App. 2e). Based on that question, the Commonwealth argues "that the trial court had a plan in advance for dealing with prospective jurors who may express moral opposition to capital punishment, which was to limit its questions in order to solicit only those opinions that would prevent the juror from following the court's instructions." *Petition* at 13. This fanciful argument does nothing to advance the Commonwealth's contention that the Third Circuit failed to accord a presumption of correctness to the trial court's ruling.

First, neither Judge Kunselman himself (at trial or post-conviction, when he reviewed this claim and Petitioner's arguments) nor the Pennsylvania Supreme Court ever endorsed the Commonwealth's theory that the trial court "had a plan." The notion is pure speculation on the

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[8]Thus, the analogy that the Commonwealth attempts to draw to Rice fails for two reasons: (1) here, unlike Rice, there was no support in the record for the trial court's finding; and (2) even if it is presumed the juror's demeanor was as posited by the trial judge, that would not satisfy the requirements for exclusion under Witherspoon.

part of the Commonwealth.

Second, if the trial judge did have a "plan," it went awry. As the District Court pointed out, Ms. Hartling "'interpreted the question as seeking [her] views on capital punishment.' ... [A]s a result, she answered only the first part of the question, stating: 'I do not believe in the death penalty.'" Pet. App. 19b (quoting Szuchon v. Lehman, 273 F.3d 299, 330 (3d Cir. 2001) and Pet. App. 3e). Neither the prosecutor nor the trial judge "ask[ed] any additional questions to probe whether the veniremember could set aside her opposition to capital punishment and apply the law." Pet. App. 20b. As the District Court further noted, the Commonwealth has never pointed to "any authority in which the prosecution met its burden of exclusion under Witherspoon/Witt with so little questioning." Id. If the trial court did have a "plan," that plan – which involved ceasing questioning as soon as a juror expressed opposition to the death penalty – resulted in a straightforward violation of Witherspoon.

3. Finally, the Commonwealth contends that there was in fact record support for the trial court's finding. The Commonwealth points to what it claims are three sources of support: (a) the trial court's observation of Ms. Hartling's demeanor; (b) inferences from the compound question asked by the trial court; and (c) the fact that counsel did not object to Ms. Hartling's disqualification. *Petition* at 14 (quoting Witt, 469 U.S. at 434-35). Neither individually or cumulatively, however, do those sources support a finding that the Commonwealth *met its burden* to "demonstrate, through questioning, that the juror lacks impartiality." Witt, 469 U.S. at 423 (citing Reynolds v. United States, 98 U.S. 145, 157 (1879)).

a. The trial court's retrospective assumption about Ms. Hartling's demeanor at most would establish that her opposition to the death penalty was emphatically expressed. Pet.

App. 21a. As even the trial court recognized after the fact, however, the strength or weakness of the juror's opposition to the death penalty is not the "relevant inquiry." Pet. App. 7d. Strong opposition to the death penalty by itself is not grounds for exclusion: "[T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they ... are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart, 476 U.S. at 176. Indeed, exclusion of a juror on the basis of strong opposition to the death penalty – as took place here – violates Witherspoon's prohibition on the exclusion of jurors "on 'any broader basis' than inability to follow the law or abide by their oaths ...." Adams, 448 U.S. at 48 (quoting Witherspoon, 391 U.S. at 522 n.21).

b. Ms. Hartling's answer to the trial court's compound question, Pet. App. 2e-3e, likewise does not support a finding that she was unable to set aside her opposition to the death penalty and follow the law. After all, the only thing she said was, "I don't believe in the death penalty." Pet. App. 3e. As the District Court explained, Pet. App. 19b-20b, that answer simply is not enough to satisfy the prosecution's burden under Adams and Witt.

Moreover, as the Third Circuit explained at length, Pet. App. 24a-26a, this case is not like Witt. In Witt, the trial court questioned the juror at length about her views, and the juror indicated (with some degree of ambiguity) that her views would indeed interfere with her performance as a juror. Witt, 469 U.S. at 415-16. In Witt, then, the juror expressed ambiguity about her ability to follow the court's instructions, and "the trial judge was entitled to use the potential juror's ambiguity to resolve the relevant question – whether she could follow the law." Pet. App. 25a. The Third Circuit distinguished Witt as follows:

> Here, by contrast, the trial judge never followed up on Hartling's *initial*

> statement that she opposed capital punishment. Under *Witherspoon* and its progeny, including *Witt*, that was error. *See Witherspoon*, 391 U.S. at 522, 88 S.Ct. 1770; *Witt*, 469 U.S. at 422, 105 S.Ct. 844 (indicating that the key question is whether the venire member would "refuse[ ] to follow the statutory scheme" controlling when the death penalty should be given). As noted above, the fact that no follow-up questioning was utilized means that the trial judge was able to compile no record concerning whether Hartling was fatally biased against imposition of the death penalty. Moreover, and significantly for present purposes, the fact that no follow-up questioning occurred also means that *no ambiguity existed in Hartling's answers as to the relevant question* – whether she could follow the trial judge's instructions. After all, as noted, even if Hartling emphatically stated that she was opposed to capital punishment, *whether she could nevertheless follow the law posed a separate question*. *See Lockhart*, 476 U.S. at 176, 106 S.Ct. 1758. Accordingly, because Hartling was never asked about her willingness and ability to follow the law, the trial judge in Stevens's case – unlike the trial judge in *Witt* – was not in a position to evaluate and factor in her demeanor when answering the relevant question.

Pet. App. 25a-26a (emphasis on "initial" in original; some citations omitted).

c. The absence of any ambiguity here likewise deprives counsel's failure to object of any significance. Even in Witt, counsel's failure to object was not dispositive – it was simply an additional fact supporting the conclusion that the trial court's decision to exclude, *based on an ambiguous record*, was entitled to deference. Witt, 469 U.S. at 434-35. Here, as the Third Circuit correctly explained, there was "no ambiguity ... as to the relevant question," Pet. App. 26a – there was simply no record of the juror's views as to that question. Therefore, there was no conceivable reasonable basis for counsel's failure to object to her exclusion, and counsel's failure to object does not create an inference that Ms. Hartling was biased.[9]

The Third Circuit and the District Court correctly applied Witt and gave appropriate

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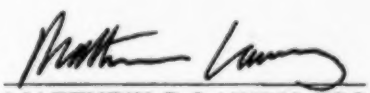
[9]Moreover, Petitioner has contended throughout that counsel's failure to object was ineffective assistance. Given that there was no procedural bar to consideration of the merits of Petitioner's Witherspoon claim, and that the merits of that claim were clear, the lower federal courts had no need to address the ineffective assistance claim.

deference to the trial court's findings. Because neither the prosecutor nor the trial court asked Ms. Hartling *any* questions concerning her ability to set aside her beliefs and follow the court's instructions, the court's exclusion of her was based solely on her expressed opposition to the death penalty, and therefore violated Witherspoon and its progeny. Indeed, on its facts this case is so indistinguishable from Witherspoon and Adams that the trial court's ruling was also contrary to and an unreasonable application of those decisions under 28 U.S.C. § 2254(d)(1). See Williams v. Taylor, 529 U.S. 362, 406 (2000) (state court decision is "contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent"); Gray, 481 U.S. at 661 n.10 (no deference to state court fact findings that are "dependent on an apparent misapplication of federal law"). However the case is analyzed, the trial court's exclusion of Ms. Hartling violated Witherspoon, and it did so in a manner that was both unreasonable and clearly and convincingly erroneous.

CONCLUSION

The trial court excluded prospective juror Nancy Hartling on the sole basis of her expressed opposition to the death penalty, with no attempt to determine whether she could set aside her beliefs and follow the court's instructions on the law. The Third Circuit, like the District Court, paid due deference to the state court ruling, and correctly found that the trial court's action clearly and unambiguously violated Witherspoon and its progeny. Not only was the Third Circuit's decision demonstrably correct, this case raises no issue worthy of this Court's certiorari review. This Court should deny the Commonwealth's petition for writ of certiorari.

Respectfully submitted,



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